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Review Essay

***1361 SUBROGATION, RESTITUTION, AND INDEMNITY**

The Law of Subrogation. By Charles Mitchell. [FNd] Oxford: Oxford University Press, 1994. Pp. xxviii, 192. \$90.00. [FNr]

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LIT -- Literature Reviews & Analyses

Subrogation is a sleepy, although significant, subject. There now is (and has been for many years) a steady flow of dull, relatively fact-specific judicial opinions on the subject. Often they repeat general principles, and only a few blaze new trails. There are some differences in the law of subrogation from state to state, but the fundamentals are clear enough and relatively stable. Despite its unremarkable position in the judicial and academic literature, however, subrogation has recently come alive, or, at least, it has come into public view -- big time. Several states have sued tobacco companies for medical payments that state insurance funds have made for the care of persons made ill by smoking. [FN1] The basic theory of recovery in these high-profile, multi-million dollar cases is subrogation. Hence, a contemporary systematic treatise on the subject would be timely.

Charles Mitchell's book, *The Law of Subrogation*, looks promising. It is a tersely written and ostensibly tightly reasoned essay in applied analytic jurisprudence. It attempts to rationalize the law of subrogation by classifying it unequivocally as a species of the genus restitution. Mitchell suggests that subrogation not only has its historical roots in the tradition of restitution, but is through-and-through, without exception, a type of restitutionary ***1362** remedy (the "Restitutionary Hypothesis"). As such, of course, an absolutely necessary condition for any subrogation is that someone would be unjustly enriched if someone else were not permitted the status of a successfully recovering subrogee. What makes Mitchell's approach an instance of analytic jurisprudence is his reliance on purely conceptual arguments. [FN2]

Unfortunately, Mitchell's promising book is unsatisfactory as a systematic treatment of subrogation. The central problem is that his analytic method has led him to adopt an organizing principle that is fatally flawed. The defects in Mitchell's thesis -- the Restitutionary Hypothesis -- result from at least one of the following vices: triviality, useless obscurity, or falsity. If Mitchell's thesis is trivial, it is because many cases, commentaries, and legal encyclopedias have repeated a version of his central thesis over and ***1363** over again, virtually ad nauseam. Subrogation, it is said, and said, and said again, exists precisely to avoid unjust enrichment. If the thesis is uselessly obscure, that is because it fails to elucidate meaningfully the real relationships between subrogation and restitution. Mere inclusion is probably not right. If the Restitutionary Hypothesis is false, that is because it purports to say something jurisprudentially significant about the essential nature of subrogation, rather than something about a particular stage of legal history or something heuristically helpful to the reasoning lawyer. The problems with Mitchell's fundamental thesis are explored in Part IV below. Before any counter-conclusions are reached, however, something should be said about the

contours of subrogation. In that context I concentrate on American law. My goal is to compare and contrast American law with Mitchell's picture of British and Commonwealth law. I will also discuss the implications of the law of subrogation for the law governing lawyers and the law governing attorney's fees.

Even if Mitchell's fundamental thesis is flawed, as I think it is, he nevertheless deserves a good deal of credit for audaciously attempting to impose simple conceptual unity upon the law of subrogation. This analytic approach fails, however, as most such projects do. The nature of the world of subrogation is a complicated, fragmented, multidoctrinal melange, which is not susceptible to any facile restatement. It simply does not exhibit the breathtaking, organized, yet simple unity for which Mitchell yearns.

I. Mitchell's Analysis

"Subrogation" is another word for "substitution." Mitchell begins with this fundamental proposition, as does everyone else. [FN3] When one party is subrogated to another or one party is substituted for another, the former enforces rights of the latter against a third-party for its own benefit. Since the subrogee is substituted for the subrogor, the subrogee's target has all the defenses against the subrogee that it would have had against the subrogor. [FN4] Subrogation is not a doctrine of "general application," says Mitchell, as it is available only in "isolated situations." [FN5]

*1364 There are two kinds of subrogation, according to Mitchell: "simple subrogation" and "reviving subrogation." [FN6] Simple subrogation occurs when S (the subrogee) is entitled to enforce the rights of someone else, RH (the rights holder), as against a third party who is primarily liable, PL. [FN7] Subrogation generally arises when S makes a payment to RH that PL was legally obligated to make. Thus S has paid PL's debt to RH. In cases of simple subrogation, RH continues to have his rights against PL. In reviving subrogation, S's payment extinguishes RH's right, thereby discharging PL of any obligation to RH. At the same time of RH's right's extinction, an almost identical right pops into being as something belonging to S, thereby creating a liability running from PL to S alone. [FN8] Insurance is an example of simple subrogation, while suretyship is an example of reviving subrogation. [FN9]

Mitchell purports to "deduce" the essence of subrogation from the cases decided in England, a variety of Commonwealth countries, and to some extent the United States. [FN10] There is a world of information contained in the single word, "deduce." By using this word, Mitchell has *1365 located himself in the jurisprudential universe. He has announced his solidarity with analytic jurisprudence, and he has told his readers that his theory of deriving principles from cases tends toward the formalistic. Mitchell's discussion of cases bears this claim out. He makes no effort to be jurisdiction sensitive; indeed, he treats all English-speaking jurisdictions as if they were pretty much the same. Neither are his discussions time sensitive. He appears to have no feel for the fact that the common law evolves. Mitchell explicitly underscores his formalistic view:

[T]here is a pressing need to deduce from the case law a coherent model of subrogation as a remedy of principled application which might be extended to cover new and different situations. . . .

. . . A more rigorous approach is needed, to account for the award of subrogation in the case law to date. It is only on the basis of such an account that it can properly be considered whether subrogation should be awarded in new situations. . . .

In the writer's view, subrogation is best understood as a restitutionary remedy: the cases in which subrogation has been awarded to date can all be explained in restitutionary terms, and the award of subrogation in the future should be guided by reference to the principle of unjust enrichment. [FN11] Thus, according to Mitchell, subrogation is in its essence a restitutionary remedy, since it invariably seeks to rectify unjust enrichment. This is the Restitutionary Hypothesis, according to which subrogation is an appropriate remedy if and only if the claimant seeking the remedy is

able to establish three things: (1) that some other party or parties have been enriched by the receipt of a benefit; (2) that the benefit [i.e., the enrichment] has been gained at the claimant's expense; and (3) that the circumstances of their enrichment are such that it would be unjust for [the person enriched] to retain the benefit (another way of putting this is to say that the claimant must show that an 'unjust factor' underlay the circumstances of his payment). [FN12] Here's how Mitchell's three conditions work in the situation of insurance subrogation. Condition (1) is satisfied when RH, the insured, receives double payment -- one from PL and one from the insurer. In this case, RH is unjustly enriched. Condition (1) is also satisfied when the insurer has paid RH but PL has not. In this case, it is PL who is enriched. Condition (2) is satisfied when the insurer has paid RH a benefit, and so

the payment of the benefit is at the insurer's expense. Condition (3) is satisfied only if the insurer can demonstrate that an unjust factor underlies the insurer's payment to its insured.

***1366** As rigorous analysis, Mitchell's formulation of these three conditions is technically unsatisfactory. It seems odd to say that PL has been unjustly enriched by RH's receipt of a benefit from its insurer, when the insurer qualifies as a subrogee, so that PL is at all times liable. Condition (2) suffers from the same sort of problem. The use of the term "gain" focuses on the enrichment of RH. Even if RH is the one who has benefitted, it is not quite right that RH gained, if RH remains liable for disgorgement. In addition, it seems strange to imply that RH's benefit has been unjustly gained at the insurer's expense when the insurer contracted to pay for RH's losses. Finally, in the presentation of insurance subrogation cases, as a practical matter, it is never an element of the plaintiff's proof to demonstrate that PL's nonpayment for RH's losses would be unjust. The subrogating insurer may incidentally and indirectly demonstrate this by proving that PL was, say, negligent or in breach of a contract. [FN13] Nevertheless, ***1367** normally speaking, in a subrogation case the insurer does not focus on proving an "unjust factor." [FN14] Moreover, the use of the word "their" in Condition (3) makes it sound as if both PL and RH must have benefitted. That problem is easily solvable. What is not so easily solvable is Mitchell's requirement that S prove as part of its case in chief that it would be unjust for the person enriched to retain the benefit. This is to analyze the complex in terms of the obscure. Any useful analysis of subrogation must proceed in terms which are better understood than the analysand. [FN15] The difficulties in Mitchell's analysis are important only because he is purporting to present a rigorous criterion for analyzing the nature of subrogation. He is not simply sketching a rough outline of what subrogation is sometimes -- or even most of the time -- like.

***1368** According to Mitchell, the primary function of simple subrogation is to prevent double payment to RH, while a secondary function is to prevent PL's unjustly retaining the amount he should have paid to RH, if RH has elected not to pursue him. The sole function of reviving subrogation is aimed at preventing PL's unjust enrichment at S's expense. Thus, the sole function of reviving subrogation is identical to the secondary function of simple subrogation. Mitchell is entirely unclear as to why the prevention of RH's unjust enrichment is the primary function of simple subrogation, while the prevention of PL's unjust enrichment is a secondary function. To be sure, some courts have agreed with Mitchell's ordering. [FN16] Other scholars, such as Robert Jerry, are inclined to believe that the prevention of PL's unjust enrichment is the primary function of all types of subrogation, and that the prevention of RH's unjust enrichment is a mere ancillary function. [FN17] Professor Jerry seems right about this. From the overall point of sound public policy and the securing of social justice, it seems far more important that wrongdoers ultimately pay for losses than that occasional windfalls be avoided. Some courts agree. [FN18]

Mitchell submits that not many cases endorse the view that unjust enrichment is a logically necessary condition for the existence of subrogation. The reason the cases do not explicitly spell this proposition out, according to Mitchell, is because the courts have not systematically recognized restitution as an independent remedy until fairly recently. [FN19] Mitchell is quite wrong to claim that insurance subrogation case law does not emphasize unjust enrichment. In fact, many American cases and commentaries do just that, if not always in so many words. [FN20]

In addition to obvious theoretical differences between simple subrogation and reviving subrogation, there is one important practical difference, ***1369** says Mitchell. That difference is that S is not required to use RH's name while suing PL in reviving subrogation. [FN21] Otherwise, the legal rules governing these two forms of subrogation are essentially the same. Testing Mitchell's Restitutionary Hypothesis, therefore, can be done either with cases of reviving subrogation or with cases of simple subrogation. Because insurance cases are by far the dominant type of simple subrogation, if Mitchell's hypothesis fails in connection with insurance cases, it falls across the board.

Mitchell correctly points out that subrogation must be distinguished from two of its siblings, neither of which has a legal name. One sibling, which I will call "Subro's Brother," occurs if S pays RH, when RH has already recovered from PL. The other, which I will call "Subro's Sister," arises when S fully pays RH, and then afterward RH recovers from PL as well. In the context of simple subrogation, S is entitled to recover from PL. In the case of subrogation's siblings, S is not entitled to recover from PL, because RH has already recovered. (Although Mitchell does not say so, as a practical matter, it is also extremely unlikely that PL would have paid RH without receiving a release.) In the case of Subro's Brother, S may recover from RH based upon a restitutionary theory. In particular, according to Mitchell, S will have paid under a mistake of fact. [FN22] S's mistake is its belief that RH has not already been paid by PL. As a result, S is entitled to receive its money back. [FN23] In the case of Subro's Sister, Mitchell again believes that S should be able to get its money back. The reason is

different, however. The legal theory for recovery is RH's duty to account to S, "for the third party's payment[,] to the extent that [RH] is more than fully indemnified by his receipt of the insurer's and the third party's payment[,] taken together." [FN24] Mitchell cites no case authority for his view that S's rights rest upon RH's duty to account. At the same time, he is critical of Napier v. Hunter, [FN25] an English case that grounds RH's duty to pay S out of an existing settlement fund upon an equitable lien impressed upon the funds RH has received from PL. Based on the equitable lien, S was entitled to sue for the recovery of the money PL had *1370 paid. [FN26] Mitchell argues that the law may impress an equitable lien upon a sum only when there is a property interest in favor of the lienholder already subsisting in the property. [FN27] Mitchell seems to think that S can have no such interest in payments made by PL to RH. It is difficult to see why not. In America, both courts and legislatures have had no trouble imposing liens of this kind, [FN28] and some courts have even held that RH holds the funds PL pays him in constructive trust for S. [FN29]

Mitchell argues that when PL and S have both paid RH, RH has a duty to account to S. [FN30] Accounting is an equitable remedy "based on the broad principle that the defendant [RH] has improperly received or withheld profits acquired from the use of the plaintiff's [S's] property . . . in violation of the plaintiff's rights." [FN31] It is arguably based on the disgorgement of gains rather than on compensation for losses. It is extremely difficult to prove as a practical matter, as it is used principally when there are lengthy business dealings among the parties, many accounts at issue, and problems of apportionment. [FN32] If the defendant invests the plaintiff's money at a profit, the defendant must disgorge not only the plaintiff's money, with interest, but the profit as well.

Accounting is not quite the right cause of action for regulating relations between RH and S. Generally, there will not be a long history of similar back-and-forth dealings, and it is completely unclear how RH's profits on money S pays should be handled. S's damages seem a better measure of recovery. Perhaps, sometimes, when an insurer and an insured *1371 have done business for years, accounting might be appropriate, but such will almost never be true in ordinary cases.

Although Mitchell does not say so, subrogation has another sibling, which, from the point of view of pure case-law jurisprudence, may be a bastard child. Nevertheless, it is extremely important, as illegitimate progeny often are. Under many circumstances, legislatures impose statutory liens in favor of insurance carriers. This situation is found in the areas of worker's compensation, [FN33] uninsured and underinsured motorist coverage, [FN34] many kinds of health coverage, [FN35] no-fault automotive insurance coverage, [FN36] and perhaps others as well. [FN37] In general, states are not constitutionally required to provide rights of subrogation when compensation is required statutorily or pursuant to a welfare scheme. [FN38] *1372 Typically, in these situations the insured, RH, acts as the plaintiff against PL, and the insurer has a lien upon amounts recovered. The configuration of the parties in these situations does not conform to the classic pattern of the subrogation case in that the subrogee-insurer is not in charge of the litigation. Nevertheless, as a payment system, the relationships among the parties, S, RH, and PL, are conceptually isomorphic with the subrogation paradigm.

Simple subrogation and its siblings are supported by two related normative principles. First, the principle of indemnity justifies them. Roughly, the principle of indemnity is that no one should recover in a legal proceeding more than the sums to which he is entitled, and recoveries are for losses. In the context of insurance, this means that no one should recover "more than a full indemnity for his insured loss." [FN39] Mitchell says that satisfying this principle is the fundamental purpose of subrogation in the insurance context. As long as the collateral source rule has life in it, subrogation is necessary. [FN40] Although Mitchell does not discuss this matter, and -- so far as I know -- it is not widely discussed in either case law or commentary, sound public policy requires that there be subrogation in the law of insurance any time the collateral source rule applies. The absence of subrogation would create a powerful moral hazard which could profoundly affect insurance prices. In the absence of subrogation, people would be tempted to conspire to perform actions which appear to be torts. That temptation would be particularly strong with regard to property damage. Two people, A and B, could conspire to destroy the property of A. A would recover from his property insurer. A would then sue B who has liability insurance. B would confess his fault and the liability carrier would pay A. Surreptitiously, then, A and B split the proceeds. (If A and B are really sophisticated, they figure out the amount by which each of their insurance premiums will increase and split the proceeds net of that sum.) Chicanery of this sort will not be uncommon in any system which contains a collateral source rule but does not provide for subrogation. There is *1373 plenty of evidence that the republic is now awash in insurance fraud. [FN41] The second purpose of subrogation -- and its second normative justification -- is the principle of restitutional justice. That idea is "to prevent the

burden of paying for the insured loss from falling on the insurer rather than on the" primarily liable party. [FN42]

II. The Contours of Subrogation

Mitchell expressly warrants that he is explicating and analyzing the law of subrogation in England and the Commonwealth. He implies that he is also glossing the American law of subrogation. Mitchell cites a number of American cases in the footnotes; cases from American jurisdictions are included in the Table of Cases; and two and a half pages of American legal commentary are listed in the Bibliography. Mitchell's explicit commitments are truer than his implicit suggestions. His treatment of American law is superficial, blind to the doctrinal diversity created by federalism, [FN43] and unaware of what appear to be some very important distinctions between American and English law. Later in this section, I summarize some important strands of American subrogation law. Some of it is quite similar to Mitchell's account of England but some is quite different.

A. General Differences Between English and American Subrogation

If Mitchell's account is correct, there may be a somewhat different attitude toward subrogation in the United States than there is elsewhere in the English-speaking world. Mitchell says that subrogation is a special, *1374 restricted remedy. [FN44] The rhetoric of courts in the United States is different. Courts here speak of subrogation in quite expansive terms. In general, it is an equitable doctrine, the purpose of which is to do substantial -- even exact -- justice. It belongs -- courts say -- to "an age of enlightened policy and refined, although natural justice." [FN45] Courts of many jurisdictions have been particularly hospitable to the right of subrogation and are inclined to uphold transfers of rights pursuant to that doctrine. Subrogation is, therefore, given a liberal interpretation. In general, insurers, having paid losses arguably within their contracts of insurance, may seek a subrogation recovery against PL, because, in effect, a subrogating insurer has paid a debt owed by PL.

B. Ten Important Features of American Subrogation Law

1. The First Principle of Subrogation -- The central axiom of subrogation is that S may recover from PL only what S has paid RH to cover a loss for which PL is liable. [FN46] This axiom -- the proverbial "First Principle" of subrogation -- has several entailments. For one thing, if S has paid RH money in excess of the loss for which PL is responsible, S may not recover the excess sums from PL. Three important situations in insurance subrogation law illustrate this proposition. First, if an insurer overpays a loss as the result of an error on the part of its adjusters, PL is not responsible for reimbursing S for the overpayment. Of course, in the law of damages, everything is approximate, so an insurer is unlikely to be held to the exact penny in the rough-and-tumble world of adjustment, litigation, and negotiation. The principle is nevertheless clear. Second, in the area of property insurance, where the vast majority of high-dollar insurance subrogation occurs, there is a contractual device which affects subrogated recoveries. Many insurance contracts covering property are "valued policies." [FN47] This means that if an item of insured property sustains a total loss, the insurer is responsible for paying a liquidated sum specified in the policy. Often, it is the policy limit. This contractual proviso substantially smooths both underwriting and adjustment. Although case law on this *1375 matter is thin, one would expect that a subrogating property insurer could not use the total-loss value stipulations in the insurance contract as a way to liquidate the recovery to which it is entitled in the subrogation action. One would expect that PL could demand that S prove that the amount it paid was actually equal to or less than the value of the injury to the property of RH. The third situation presents the same problem as the second in conjunction with replacement-cost endorsements, which are found in many property insurance policies. In the absence of a valued-policy proviso or a replacement-cost endorsement, property insurance policies generally pay the insured the "actual cash value" of the property destroyed. The law is jumbled about what the phrase "actual cash value" means. [FN48] Replacement-cost endorsements are helpful to the insureds, because they permit them to price their losses simply in terms of prevailing market values. They are helpful to insurers for the same reason, and because these endorsements usually add a bit to the price of the policy. Replacement-cost endorsements can be a headache in the context of subrogation, however, where the insurer will be restricted to the tort measure of damages inflicted upon the property and

that measure will almost never be replacement cost. [FN49]

Another consequence of the fundamental axiom of subrogation is that an insurer is not entitled to the punitive damages or statutory penalties to which RH might be entitled from PL. [FN50] The fundamental reason supporting this corollary is that S is not "out" the money. After all, S did not pay RH these sums. This justification for restricting S's right of recovery is not conclusive, however. Doesn't S get substituted for RH? Doesn't S step into the shoes of RH? If RH has the remedy, why does S not have it? Is this a consequence of the restitutionary basis of subrogation? If so, we have a puzzle. According to Mitchell, restitution authorizes S to demand recovery from PL or RH. He did not apply it to limit the recovery of S. Perhaps this limitation results from the principle of indemnity. But that principle is at home only in recoveries that are, to at least some degree, designed to compensate for losses. Punitive damages are never a matter of compensation, at least in theory. Similarly, awards of statutory multiples*1376 are not for compensation. They are both designed to punish, and perhaps to deter. If RH indicates that he has no intention of seeking punitive damages from PL, why shouldn't S be permitted to function as a private attorney general? If the function of punitive damages is to punish the wicked and deter the reckless, a property insurance company which has properly paid the claim of its insured might well be an ideal prosecutor. Besides, there appears to be an element of unjust enrichment in permitting PL to hang on to his assets when he has maliciously injured RH. Because only RH and S can punish PL, if RH is disinclined to do so, then S should be permitted to do so. [FN51]

2. Recovery from the Insured -- As applied to insurance, the second major principle of subrogation is that S may not recover from an entity which is either identical to its insured or very closely related to it. [FN52] Although Mitchell does not discuss this matter at any length, American authorities agree that because an insurer "steps into the shoes" [FN53] of its insured it cannot sue its insured upon a theory of subrogation, because that would involve the insurer suing itself. Such an idea is a conceptual *1377 comedy. [FN54] Similarly, insurers may not sue persons or entities closely related to the insured. The courts have not specified a clear criterion for what constitutes a close relationship -- nor, given the nature of subrogation, could they. Perhaps the best that can be said is that subrogation should not permit an insurer to sue an entity closely enough related to the insured that a successful recovery would automatically injure the actual insured financially. [FN55] How close does the relationship have to be? Mitchell does not discuss this; in practice, it is a matter to be decided on a case-by-case basis. Sometimes, for example, lessees are "other insureds," sometimes not; sometimes the relationship between a landlord and tenant is close enough to preclude subrogation, sometimes not. [FN56]

This problem comes up in unusual and instructive situations. In one case, an automobile dealer permitted one of its customers to drive a car owned by the dealership while the customer's car was being repaired. There was an accident. After carefully analyzing the dealer's insurance policy, the court concluded that the driver was not an insured for subrogation purposes. [FN57] In another unusual case, a summer house caught fire. The house had been in the family for a long time. The matriarch left it to some of the brothers upon the understanding that other members of the family would be able to use it. All the brothers who used the house made contributions to its upkeep and repair. Eventually, the house burned while one of the non-owning brothers was vacationing there. Because the insurance agent knew the pattern of use of the house, the court held that the non-owning brother in question was an insured for subrogation *1378 purposes. [FN58] What is interesting about these cases is how ad hoc (that is, results oriented) they are. These courts do not study the insurance policy and the facts, decide who is an insured and who is not, and then trace out the consequences of their analyses for subrogation. What these courts do is decide whether subrogation is appropriate and then decide whether someone is an insured. They even talk about someone's being an insured for-the-purposes-of-subrogation.

3. Recovery from Entities with Rights Under the Insured's Policy -- An insurer-subrogee may not recover, generally speaking, from an entity which is insured through the same policy pursuant to which S paid RH. In some instances, the rationale underlying the third principle of subrogation is the same as that underlying the second principle. Frequently, all of the insureds under a given policy are interrelated people or entities. This is not always true, however. Sometimes, an insurer will be contractually required to include some company or other party under its policy as an other-insured. Mitchell does not discuss this problem, and the theoretical basis for forbidding subrogation in this context is really quite weak.

Sometimes, the law forbids an insurer to seek subrogation against an entity it insures under another policy. Mitchell does not discuss this situation. Sometimes, the same insurance company

insures both RH and PL under different policies. The situation arises most frequently in the realm of automobile insurance, and in such cases, some courts hold that an insurer which has paid RH's property damage claim may not subrogate against PL, when the insurer provides PL liability insurance under his auto policy. [FN59] The reason why an insurer might not be permitted subrogation in this context arises out of the insurer's duty to defend PL against the claim of RH. Sometimes, of course, these suits do not make sense. An insurer is paying itself, in effect. But this is not always true. Sometimes PL has an excess liability policy which might pay "new" money.

4. Agreements Between RH and PL -- If RH releases PL, covenants not to sue, or waives subrogation pursuant to a contract, then S's claim against PL is generally defeated. [FN60] This proposition is true without reference*1379 to the time at which RH performs the crucial act. In the case of insurance subrogation, RH may perform the crucial act either before the insurance contract is purchased or afterwards, and either before the insured loss is sustained or afterwards. If RH acts before the insurance is purchased, then, in the absence of fraud or misrepresentation, the insurer assumes the risk of paying the loss without subrogation rights. If RH performs the crucial act after the contract is formed, then RH may undermine his own claim under the insurance policy. This point is almost always true when RH releases PL after the loss, when PL has no notice of S's interest. (When PL knows of S's subrogation interest, RH's release may not be effective.) [FN61] Similarly, if S pays RH without realizing that RH had destroyed S's subrogation rights, S might be able to recover the amount it paid from RH based on a theory of restitution founded on a mistake of fact. Mitchell is quite clear about this point. [FN62] Whether recovery is possible would depend upon the facts of the case. If S made a payment knowing that RH had destroyed its subrogation rights, then S would have paid RH and that would be that. If S had overinsured RH by one hundred percent, pursuant to a valued policy, RH released PL, and RH sustained a total loss, then at least in theory S should be able to recover only half its payment, given its mistake of fact. Often, insurance contracts contain "consent to settle" clauses. The insurer may have liability to the insured if someone else does not pay the insured (or pay him enough), as is the case with uninsured and underinsured motorist coverage. In these situations, insurers often have the right to approve or disapprove prospective settlements. If the insured releases the tortfeasor or in some other way compromises the insurer's rights, then the insurer is not required to pay under the policy. [FN63]

*1380 5. Volunteers -- It is often said that volunteers do not have any rights of subrogation. [FN64] Prima facie, this means that if S pays RH without any legal duty to do so, then S may not have any right of subrogation against PL. It is entirely unclear why this rule ever should have obtained, if restitution is the sole foundation of subrogation. After all, if an insurer pays voluntarily, RH may still be able to sue PL and thereby obtain more than he has lost, or RH might not pursue payment, in which case PL is unjustly enriched. Both of these states of affairs are contrary to the basic postulate of restitution. As applied to insurance subrogation, the volunteer rule is occasionally set up as a defense on behalf of PL. The general idea is that if an insurer pays a claim to which its insured is not contractually entitled, then S does not act under the yoke of legal necessity, because RH was not entitled to any payment from the insurer. Although there may have been a time when this kind of reasoning was applied strictly -- perhaps formalistically -- it hasn't been treated that way in many years. For one thing, the volunteer rule, understood rightly, is quite different from the slogan, Volunteers can't subrogate. Correctly and fully stated, the rule barring subrogation recovery by volunteers requires that the volunteer act with full knowledge of all relevant facts and without any fraud, deception, duress, or coercion. In order to qualify as a volunteer for the purposes of this rule, the paying person must have acted freely, of his own accord, and intentionally, i.e., knowledgeably, purposefully, or by design. [FN65] For another thing, sound social policy encourages insurers to err on the side of caution when rejecting claims. This means that public policy favors both the payment of some undeserving insureds and the overpayment of some disputed claims. One support for this public policy norm is the desire to encourage the insurance industry to finance losses. This aspect of the public will requires that insurers be permitted to recover by subrogation colorable claims paid, even if, in the end, these claims were not, strictly speaking, covered.

Mitchell suggests another reason for favoring subrogation in these circumstances. He writes that *1381 the courts wish as a matter of general policy to encourage insurers to pay their insureds even though they are not legally obliged to do so. This policy is closely tied to the courts' general assumption . . . that the burden of an insured loss should be made to fall wherever possible on a third party who is liable for the loss rather than upon the insurer or insured. [FN66] Something is wrong here. It is entirely unclear that Anglo-American jurisprudence has a general policy encouraging insurers to pay uninsured losses. Unquestionably, there is a general policy disfavoring the payment of

fraudulent claims, and -- given the price of insurance -- there is probably another public policy favoring the prudent review of claims by insurers. Hence, Mitchell's principle is almost certainly too broad. Insurers need breathing room, to be sure, and the social function of insurance is to finance loss. At the same time, one doubts that subrogation does much to encourage the payment of questionable claims. Currently, the common and statutory law of insurer bad faith is a more powerful incentive. [FN67]

Probably the volunteer rule was never strong. Part of the reason may derive from another formulation of this rule. Courts sometimes say that a person is not volunteering if he is protecting his own interests. [FN68] This formulation is not equivalent to the formulae already considered, although this fact is not the subject of great comment (Mitchell, for example, does not refer to it). At any rate, I have never seen a case turn on the volunteer rule. In fact, though I have observed lawyers and reinsurers fret over it, I have never seen the volunteer rule influence a subrogation case. [FN69]

The principle has little life in it. Consider the following. I received a number of calls from property insurance companies immediately after the 1995 bombing of the federal building in Oklahoma City asking whether various payments should be made on neighboring buildings. My visceral ***1382** reaction was that it would be utter madness for a property insurance company to refuse payment to the owners of surrounding buildings. I gave this advice for three reasons. First, although property insurance coverage is frequently subject to an exclusion for wars, civil wars, insurrections, and the like, I did not think there was evidence that anything approaching an insurrection had occurred in Oklahoma City. Second, I thought that insurers governed by the common law of insurer bad faith and by the Unfair Claims Practices Acts enacted in many states would probably have to move more quickly than the pace of the criminal investigations would permit. [FN70] Hence, even if the FBI eventually turned up a political conspiracy, this evidence would come too late to justify nonpayment. Third, I also thought that declining an Oklahoma City bombing claim -- necessarily a public event -- made very little business sense, although such considerations are irrelevant to strictly legal opinions. I have no more doubt about the advice I gave today than I did on the day I gave it. The advice was sound -- in fact, obvious. I have since checked it with several experienced property insurance lawyers, and they agree. Nonetheless, I might have been wrong. Perhaps there was some sort of conspiracy. Perhaps what happened was an insurrection, which fell apart quickly. Frankly, I hurried the insurers along. I thought business policy and public relations required fast actions. They felt the pressure and resisted a little. Perhaps they resented a mere lawyer sticking his nose into business matters. Two of them asked about the volunteer rule. If there is a target defendant -- such as the nitrate manufacturer that might pay for the massive Oklahoma City property losses -- could an insurer, having paid its insureds, be barred from subrogation under the volunteer rule if there is -- ultimately -- found to be a conspiracy? There might be a PL. After all, the insurers of the World Trade Center have found solvent defendants to sue. [FN71] Given the circumstances of the Oklahoma City case, there is little practical doubt that subrogation would be permitted and that the volunteer rule would not apply.

Mitchell's discussion of the volunteer rule wobbles. He describes the effect of one of the cases he considers, *King v. Victoria Insurance Co.*, [FN72] as follows:

[W]herever a valid contract of insurance exists between an insurer and an insured, any payment the insurer makes in the belief that it is bound to pay under the terms of the policy will entitle it to simple ***1383** subrogation. As we have said, this rule may be explained by reference not only to the unjust factor of mistake, but also to the fact that the courts wish as a matter of general policy to encourage insurers to pay their insureds notwithstanding that they are not strictly bound to do so under the terms of the insurance policy. [FN73] The rule of *Victoria Insurance* is probably not the conventional rule. First, in order for an insurer to have the right of subrogation, the contract of insurance need not be valid. If the contract of insurance is invalid, and the insurer does not know it, there is surely still a right of subrogation. After all, payment was made. Second, it need not be the case that the insurer affirmatively erred in believing that there is coverage. The carrier might pay without being completely clear, one way or the other, whether there was coverage. The insurer might pay while in a state of doubt. In the case of nonfraudulent, plausible, but uncertain claims, the norms of public policy probably militate in favor of payment, and so subrogation rights would be undisturbed, even if the existence of coverage could never be empirically indicated. However, if an insurer pays as the result of believing that payment is owed, that belief may not be completely irrational. Surely an insurer must have some at least minimally good (i.e., colorable) reason to believe that there was an obligation to pay under the contract.

6. The Insurer's Suing in Its Own Name -- Mitchell submits that S must use RH's name in lawsuits

predicated upon simple subrogation. [FN74] This may be true in Great Britain and the Commonwealth, but it is most certainly not true in the United States. In a subrogation case, the insurer may use its own name in most jurisdictions. [FN75] Moreover, sometimes defendants can require that the real party in interest be identified, [FN76] as they generally can in the federal system. [FN77] Insurers elect to proceed under their own names in two circumstances. First, if the insured is not well thought of in the community, the insurer will want everyone to know that its money -- and not the insured's -- is at stake. This situation is very rare. *1384 Second, insurers proceed under their own names when the insured does not want its name used. The insurer may have a legal right to require the insured to permit the use of its name, but sometimes the business relationships between the insurer and the insured are such that they reach a different, negotiated solution. This situation is common where the insured is a large industry and the target-defendant is a business important to the insured. Mitchell also says that S may not sue in the name of RH in cases of reviving subrogation. I know of no influential American authority for this proposition.

7. Compensation of the Insured -- According to Mitchell, RH must be fully compensated before S may receive any recovery at all. [FN78] This principle is subject to doubt in some states, [FN79] while other states subscribe to this rule whole-heartedly. [FN80] One state has even denied subrogation to a health carrier until property damages claims of the insured had been paid. [FN81] A number of jurisdictions have struggled with the question of how to allocate recoveries between insurers and their insureds when the insured has not been made completely whole. In general, there are three approaches. Under the first, the insured gets all the recovery until it has been made whole. In the trade, this rule is called "first dollar out." This is Mitchell's account of English law. [FN82] On the second approach, the insurer and the insured prorate the recovery. [FN83] On the third approach, the *1385 insurer gets its money first and if there is anything left over, the insured is made whole. [FN84] The fact that there are disagreements among courts about how insurers and insureds should divide the proceeds of subrogation suits demonstrates that it is false to claim flatly that RH must be fully compensated before S may receive any recovery. This point is true, even if "first dollar out" is the majority rule. [FN85]

The case of *Napier v. Hunter*, to which Mitchell devotes considerable attention, is significant in this context. The case is potentially quite important, and so it merits discussion and critique. *Napier* arose out of the woes at Lloyd's of London caused by the asbestos-use catastrophe. Thousands of workers and others in the United States and elsewhere have been injured by this stuff. Millions of dollars have changed hands, and there is a small subindustry of asbestos litigation. One of the Lloyd's syndicates -- Outhwaite Syndicate 317/661 -- had substantial exposure during one of the years, and it did not buy sufficient reinsurance, that is, insurance covering insurance. The individuals who were jointly and severally liable as Lloyd's insurers had to pay. A "stop-loss" insurer covered some of their losses. There were amounts the "Names" -- the liable individuals -- had to pay, however, before the stop-loss insurance policy kicked in, and amounts on top of -- or in excess of -- that policy. The court used the following example: The Name had to pay $\geq 25,000$ before the stop-loss insurer paid; the stop-loss insurer paid $\geq 100,000$; thereafter the insured Name continued to pay up to $\geq 160,000$.

The Names sued the Outhwaite managers. [FN86] They settled for an enormous sum, but one which was not enough to cover both the actual losses of each Name and all the losses of the stop-loss insurer. The stop-loss insurer intervened, sought to enjoin the distribution of the settlement fund, and asserted a right to part of the settlement fund based upon subrogation. One of the issues before the Law Lords was how the value of the stop-loss insurer's subrogation rights should be computed.

The Names argued that they should be made whole before the insurer received anything. Their Lordships disagreed. They held that because the Names had agreed to pay $\geq 25,000$ before the stop-loss insurer paid *1386 anything, the insurer should recover all its money before the insured recovered any part of the $\geq 25,000$ it agreed to pay first. (Of course, the Names were made whole first for all sums they paid above the stop-loss contract.)

Under that policy the insurer begins to pay when the loss reaches a certain level -- only when there has been an antecedent loss to the insured Name. Although the court does not say so, it has essentially held that if a policy of insurance involves "a deductible," then the subrogated insurer recovers before the insured recovers the amount of loss it sustained pursuant to the deductible clause. There is nothing in any of the opinions to suggest that the holding in the case is restricted to stop-loss insurers, so it should have general application. Moreover, their Lordships' line of reasoning implies that when there is a column of coverage -- layers of excess policies atop a primary policy -- the highest level excess carrier should receive the first monies out of the subrogation pot.

Mitchell appears to endorse the position of the court. This is a mistake. Nothing in any insurance

contract -- whether it is the deductible provision or the coinsurance clause -- remotely implies than an insurer should be reimbursed, based upon subrogation, before the insured. Nor does the Napier court give anything in the way of an argument. The function of the deductible is to relieve the insurer of dealing with smaller claims, to encourage safety on the part of the insured, and to control the price of the contract. None of these considerations suggest that the insurer should recover ahead of the insured, insofar as the deductible is at stake. Insurers do not compute subrogation recoveries into the price-deductible computation. Subrogation recoveries are too iffy to play any role in controlling moral hazards. And no considerations regarding claims within the deductible are relevant here.

It makes no difference to this argument if the lowest sums at issue are called a "self-insured retention" or a "deductible." The former phrase is fashionable in commercial insurance circles just now, but it has virtually no fixed meaning. Contrary to the plain meanings of the components of the phrase, "self-insured retention," as commonly applied, certainly does not require that an insured have engaged in pre-loss actuarial underwriting computations or have put appropriate sums of money away to cover such possible losses. Even if an insured were to do this, that is no reason to deprive him the first dollars out of the subrogation recovery. The function of insurance, after all, is to make the insured whole.

Napier also may imply that highest-level excess carriers recover first in subrogation cases. If so, the court's vision of sound policy is impaired. High-level excess coverage is relatively inexpensive and highly profitable as things stand. Primary coverage is much more expensive, much more threatened by insolvency, and -- in many years -- financed by relatively small *1387 profit margins. Here is where subrogation income is needed to finance insurance markets.

8. Commencing a Subrogation Action -- According to Mitchell, S may not proceed against PL until RH has been fully compensated. [FN87] This principle may apply in Great Britain and the Commonwealth, but it does not apply in all American jurisdictions. Many progressive jurisdictions permit an insurer to commence a subrogation action immediately upon making some payment. [FN88] Not all jurisdictions permit this, however. [FN89] (Interstate conflict is the glory of federalism.) The former rule is the better one. That rule does no violence to the concept of subrogation as such; it permits the adjustment of claims to proceed at a pace chosen by the insured and the insurer; it permits PL to pursue evidence before the trail gets colder; and it avoids potential statute of limitations problems.

Sometimes one sees "loan receipts" used in this context. Insurers use such instruments partly to avoid having to sue in their own names. There is some concern that if the insurer receives an assignment of the insured's causes of action, it will be forced to use its own name. [FN90] The other use is to create an easily producible document that will prove that the insurer has paid some money and therefore has some subrogation rights. Loan receipts are generally recognized by the judiciary to be unnecessary legal fictions. Property adjusters are accustomed to using them, however, and they do not appear to do much -- if any -- harm. Then again, I have never seen one do an insurer any real good.

9. Dissolved Fictitious Entities -- According to Mitchell, S may not subrogate against PL if RH was a fictitious entity, such as a corporation, and has dissolved before the subrogation controversy is concluded. [FN91] Mitchell provides no reasons why this observation need be so. Of course, if the insurer must proceed in the name of the subrogor, and if that entity has passed out of existence, then it is difficult to see how the lawsuit can be brought. This is the kind of reasoning that gave Formalism a bad name, however. In the United States, this problem is not really an issue, because the insurer can proceed in its own name. I have never seen a *1388 subrogation case defeated -- or even deferred -- by problematic corporate technicalities surrounding the insured.

10. Contractual Subrogation -- Subrogation may arise as a result of contract as well as automatic (equitable) operations. Contractual subrogation is also called conventional subrogation. [FN92] Insurance policies frequently contain contractual subrogation clauses. Here is the clause used in many homeowners' policies:

SUBROGATION. An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us. If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us. [FN93] This paragraph includes a waiver of subrogation by the insurer, if the insured releases PL before any loss takes place. Such a release could occur either before or after the formation of the insurance contract without affecting the insured's contractual rights. In addition, the quoted language contains a clause pursuant to which RH is obligated to assign his rights

against PL to S. Insurer waivers of subrogation are common in contracts of purchase in which one large business buys equipment from another.

Mitchell notes that contractual subrogation and assignment are very similar. According to him, the most notable way in which they are similar lies "in the fact that there is no necessary limit to the quantum of recovery by a party who has acquired rights of action by either means." [FN94] At the same time, Mitchell suggests that a contractual subrogee may use the name of the contractual subrogor as the named plaintiff, whereas the assignee must use his own name. For this reason, according to Mitchell, "the subrogation clauses contained in insurance contracts generally stipulate that the insured must lend his name to any action brought by the insurer against a third party in respect of the insured loss." [FN95] It is important to keep in mind that subrogation and assignment are quite dissimilar from a historical point of view. At common law, causes of action for personal injury were not assignable, but they could be acquired through subrogation. [FN96] The stated theory of the common law for nonassignability was that a cause of ***1389** action for personal injury did not survive the death of the victim and so could not be assigned. [FN97] One wonders if there weren't unofficial ideological, perhaps even class-based, reasons.

It is puzzling why insurance contracts contain contractual subrogation clauses when subrogation is automatic. Mitchell suggests a reason:

the insurer's legal right to simple subrogation is subject to various restrictions, for instance, the insurer can be simply subrogated to the insured's action against a third party only after the insured has been fully indemnified under the policy, and the insurer is not entitled to recover more than the amount of the payment to its insured. By specifying in its contract with the insured that these restrictions will not apply to its contractual right of simple subrogation an insurer can therefore measurably improve its position, and whilst it is most probably obligated under the general principle of *uberrimae fides* [with utmost good faith] to pay due regard to its insured's interests when exercising its contractual right to simple subrogation, there is no reason as a matter of principle why an insurer should not be entitled to improve its position in this way. [FN98] This explanation seems wrong. If the insurer is proceeding on a theory of subrogation, then -- contract or not -- the insurer is subject to the same equitable constraints governing any subrogee. [FN99] As long as the insurer is receiving subrogation rights, rather than some sort of an assignment, or if the subrogee is assigned only subrogation rights, the subrogation agreement can express nothing more than what the law would automatically provide. For example, if the agreement genuinely is a "subrogation agreement," and if the insurer can obtain by means of subrogation no more than it has paid its insured, then a subrogation agreement cannot provide the insurer with the right to additional monies. An assignment might, but a subrogation agreement cannot. Moreover, it is clear that some rights cannot be assigned. Classically, at common law, no personal injury claim could be assigned. That rule has weakened considerably. Nevertheless, currently causes of action for legal malpractice cannot be assigned in many jurisdictions, while they can be acquired by subrogation in most jurisdictions. [FN100] Similarly, RH may not be able to assign its rights to ***1390** punitive damages to S. [FN101]

The unnecessary and ill-considered nature of subrogation agreements has been understood for a number of years. According to Spencer Kimball and Don Davis,

the range of legal subrogation could be extended by agreement, but in the past companies have made few efforts to extend it. Although subrogation clauses are very common in insurance policies, on the whole they merely confirm rights that would exist without them, and at most they alter the incidents of legal subrogation in some particulars. [FN102] Probably the distinction between an assignment and an express subrogation agreement is a theoretical tempest in a philosophical teapot. I have never seen a case turn on this issue, and legally sanctioned transfers of large sums of money should not turn upon medieval subtleties. Formalism was, after all, overthrown some time ago.

III. Subrogation and the Attorney

The law of subrogation has special implications for the law governing lawyers. Mitchell does not discuss this topic at all. It is certainly a matter, however, that should be discussed in a comprehensive book concerning the law of subrogation. Whether legal malpractice insurers may subrogate against co-tortfeasors, or others, is a legally underdeveloped topic. [FN103] In addition, two other problems stand out: the law governing attorney's fees and the law governing conflicts of interests.

A. Attorney's Fees

Let us suppose an attorney, L, represents S in an action against PL, and that L recovers a sum of money in excess of the amount S paid RH. *1391 Under standard rules of subrogation, the overage must be paid to RH. Now suppose L represents RH in a suit against PL and recovers a sum of money greater than RH's residual damages, calculated by subtracting S's payment to RH from RH's total damages. In this case, RH will be obligated to pay the overage to S. But what of L? Usually, subrogation cases are undertaken on contingency fee arrangements. This is because most subrogation cases are really just plain-vanilla tort cases, so far as the substantive law is concerned. Must L look only to his client for his fee? If so, and if L represents RH only, then L's entire contingency fee will be charged against RH's recovery. Is the amount of L's contingency fee to be calculated as a fraction of RH's recovery or the total recovery? Suppose L represents S. Is L's contingency fee payable only out of S's recovery, or is it dependent upon the amount of RH's recovery as well?

In general, the amount of L's contingency fee is calculated by reference to the entire sum L recovers, and the recoveries of both RH and S bear the burden of L's fee, pro rata, without respect to whom L actually represented. [FN104] Obviously, this rule represents a departure from the principle that in general lawyers look only to their clients for payment, or to a contractually obligated third-party payor, even if their activities have benefitted some person who is a non-client. [FN105] The rationale is often called the "common fund doctrine." [FN106] It is a principle of equity that provides that if a lawyer creates a corpus of money which benefits a group of people, the entire fund will be charged with a lawyer's fee and that the charge will be born proportionally by all of the beneficiaries of the fund, [FN107] even if some of those people are not clients and have no *1392 contractual obligation to pay L. The principle was developed outside the law of subrogation. Although the common fund doctrine is itself an exception to a more general rule, that doctrine has exceptions of its own. If L withdraws from the representation of S, L forfeits any right he might have had to a fee from S, and S's participation in the recovery is not burdened with any of L's fee. [FN108] More routinely, if S retains its own counsel and if counsel for S participates in the litigation, then L (who represents only RH under these circumstances) has no right to a fee from S's portion of the fund. [FN109]

From a practice point of view, the best thing for L to do is to clarify all aspects of his fee arrangement as soon as possible. Usually, in situations where the insurer has a statutory subrogation lien, RH is the plaintiff, controls the litigation, and selects the counsel. In that situation, L should contact the insurer and form a retainer agreement. Obviously, L needs to keep RH informed. So long as the burden of attorney's fees is borne pro rata between RH and S, L's arrangements with S should make no difference to RH. RH should approve L's representation of S, however, because court costs are fixed, and if S has an express arrangement with L, it becomes more probable that a court will routinely require S to pay a fraction of any court costs which are not shifted to PL.

B. Conflicts of Interest

Whenever a lawyer represents two clients or more, there is the potential for a conflict of interest. In a normal subrogation case, where L represents both S and RH against PL, the prospects of genuine conflicts of interest are minimized because S's right to the proceeds is fixed. The largest problem that will arise in this situation concerns violations of the principle of indemnity by the insurer. Three of these problems have already been considered: errors in adjustment, valued policies, and replacement-costs endorsements. [FN110] But there is more. Sometimes it is difficult to explain to novice adjusters why insurers are not entitled to receive from the proceeds of the tort case everything it paid out. As a practical matter, this problem can become more pronounced when the claims representative suffers from a unique psychological pathology that *1393 afflicts only the really conscientious adjuster, to wit, the impulse to see the insurance company's money as her money. When that happens, the adjuster wants her money back, and it is sometimes difficult for her to understand that subrogation is limited by the principle of indemnity, even if that principle admits of some exceptions in insurance contract provisions. Nevertheless, this is nothing more than a friction of everyday life, and it is usually readily overcome by rational dialogue between persons of good will. [FN111]

There is another quasi-structural problem which is hidden, less tractable, and not exactly dealt with by the law governing lawyers. This problem concerns how subrogation counsel relates to the person he does not represent. If L is subrogation counsel for RH, then L's dealings with S may be problematic. [FN112] If L represents S first, then his dealings with RH may be problematic. It is the second of these alternatives which is the most fraught with difficulty. Industrial property insurers keep on retainer, as it were, a few outside firms to pursue their subrogation cases. To some degree,

these firms specialize in such cases, and, over the years, they have acquired real expertise in pursuing tort theories, overcoming contract disclaimers, defeating waivers of subrogation, and proving up complex property damages. Frequently, not all of RH's losses are covered. There may be a large deductible; some of RH's property may not be covered under the policy; or there may be extensive business-interruption losses which are either not covered or covered only partly. [FN113] Often S retains L to look at subrogation almost immediately after the catastrophe -- shortly after the refinery blows up, the building falls down, the transformer boils itself in its own oil, or any of the other myriad of industrial disasters that cause millions of dollars in property damage every year. It is not unheard of for subrogation counsel to be retained and to arrive at the scene of a disaster before the flames are put out. Sometimes claims-people, lawyers, forensic engineers, metallurgists, disaster-relief psychologists, and the like all arrive on the same plane.

***1394** It is generally in everyone's interest for L to represent RH as well as S. This cuts RH's legal expenses; it simplifies the gathering of evidence as well as the presentation of the case; and it minimizes the amount of "base-touching" that goes on in the preparation of a significant piece of litigation. Insurers frequently try to persuade their insureds to enter into agreements regarding how the proceeds from recoveries are to be split up. Clearly there should be an explicit, written agreement. Frequently, the insurance company wishes to persuade the insured to accept a pro rata division of the proceeds. Often, L is deeply involved in this process.

When this happens, L has a problem. He is trying to sell himself to RH as RH's attorney (and S would very much like this to happen). As counsel and agent for S, L may find himself attempting to persuade RH to accept a pro rata agreement. It is tempting under these circumstances for L to say something to the effect that "Pro rata agreements are customary," or "This is the way it is done in this sector of the insurance industry." If L says this, L has violated one black-letter rule of professional responsibility and may have violated a fiduciary duty. The black-letter rule of professional responsibility is Model Rule 4.1, entitled "Truthfulness in Statements to Others," which states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a . . . fraudulent act by a client [FN114] If the lawyer states that it is the industry custom that division of proceeds shall be pro rata, and if the lawyer knows his business, the lawyer has lied and is subject to discipline, as well as other remedies, such as fee forfeiture. [FN115] Under Rule 4.1(b), if L knows that S has represented to RH that pro rata division is the industry custom and standard practice, L must disclose S's lie. Moreover, if either L or S misstates the facts under these circumstances, S may be liable under the common law of insurer bad faith, state deceptive trade practices acts, or state insurance codes.

L's false statement or his failure to speak may also constitute a breach of fiduciary duty to RH. By hypothesis, L is not yet RH's lawyer. Because that is true, how could L possibly owe RH fiduciary duties? This question is resolved by case law. Before the client-attorney relationship is formed, a quasi-client-attorney relationship has already emerged. Certain disclosure privileges attach as a result of that relationship, and, most ***1395** probably, fiduciary duties also attach. In general, if a lawyer is in dialogue with a prospective client, and the dialogue is intended to be a prolegomenon to a client-attorney relationship, the attorney probably owes the person fiduciary duties. [FN116]

IV. Critique

Mitchell's book suffers from a number of incidental difficulties and unclaritys, as the preceding discussion demonstrates, and its discussion of insurance subrogation is parochial, given the book's pretension to being systematic. The Law of Subrogation is beset with a graver problem, however. I suggested at the outset that Mitchell's central thesis, the Restitutionary Hypothesis, suffers from one or more faults. The thesis may be historically trivial. It may be too obscure to be helpful. It may simply be false.

Mitchell suggests that the Restitutionary Hypothesis -- the thesis that subrogation is essentially, through-and-through, a species of restitution and hence that unjust enrichment is an absolutely necessary condition for subrogation -- is a proposition to which many, many courts have expressly subscribed over quite a long period of time. Obviously, this is a historical claim, and a number of cases cited in this Review Essay suggest that many American courts have expressly subscribed to the Restitutionary Hypothesis. [FN117] Indeed, the proposition is so well known that it is black-letter law in textbooks written for law students. Keeton and Widiss write the following:

Subrogation, which developed as an equitable doctrine, facilitates an adjustment of rights to avoid unjust enrichment in many types of situations In the Insurance context, when an insurer indemnifies an insured who is entitled to recover compensation for that loss from another source, in some situations the insurer may be subrogated to the insured's rights. [FN118] So what's the big deal? Perhaps Mitchell meant only to imply that there are not very many cases from the last century (or before) explicating the restitutionary nature of subrogation. If that is his thesis, the fact that theories of restitution have a short judicial history is only one possible explanation. Another is that most subrogation cases are insurance cases. *1396 The oldest kind of insurance in which subrogation is regularly found is property insurance. Outside the area of maritime insurance, property insurance has a relatively short history. It was not in widespread commercial -- much less noncommercial -- use in this country, for example, until the twentieth century. No wonder there aren't many cases.

The Restitutionary Hypothesis suffers from another problem. It appears to suggest that subrogation is just a form of restitution. This claim cannot be true. For one thing, if S steps into the shoes of RH, and RH is entitled to damages, then S is entitled to damages, not restitution. There may be a restitutionary impulse behind authorizing the substitution, but once the substitution is made, the measure of recovery is governed by RH's rights. S's participation in that recovery may be limited by S's payments, so that there may be a restitutionary limit on a recovery measured by the theory of damages, if S is the only party with any interest at stake; but the interaction of restitution and damages does not make restitution the measure or the sole foundation of recovery. Moreover, if S's right to recovery were really restitutionary, through-and-through, then the insurer might be able to recover the expenses it incurred in adjusting the loss. (After all, by incurring those expenses, S conferred benefits upon RH, saved PL the expenses of monitoring RH's loss, or both. Hence, there is arguably unjust enrichment of a rather oblique sort.) Such a measure of recovery, however, would be inconsistent with subrogation, because when S is subrogated to RH, S is entitled to the recovery of RH's damages (at least to the extent S paid them) and not to any of its own losses. Strictly speaking, this renders subrogation and restitution inconsistent. Of course, if restitution and subrogation are inconsistent, then subrogation cannot be a species of restitution.

There are less arcane reasons, however, why it is misleading to see subrogation as essentially a species of restitution. Life insurance provides an excellent example. As everyone knows, life insurers are not subrogated for the claims they pay. Three reasons are usually cited for this fact about life insurance. First, life insurance policies are not indemnity policies, and so subrogation is inappropriate. [FN119] Second, whole life policies are really a form of savings, [FN120] and insurance in general is as much a matter of financial planning as it is insurance. [FN121] Third, death is so drastic that beneficiaries of life insurance policies should be able to get both the proceeds of the policy and wrongful death damages. [FN122]

*1397 None of these explanations is satisfactory. Life insurance policies do have an indemnity feature, to the extent that the purpose of the life insurance is to insure against untimely death, and not death itself. While it is true that whole life policies have a savings aspect, term life policies do not. The mere fact that life insurance is financial planning is completely irrelevant as to whether life insurance indemnifies the beneficiaries of the policy for losses. All insurance is financial planning. It is extremely difficult to discern a principled reason why any person who is both beneficiary of a life insurance policy and a qualified plaintiff under a wrongful death statute should always be entitled to both recoveries.

In the end, it is extremely difficult to see why an insurer who has made a payment under a term life insurance policy for untimely death should not be able to have the status of a subrogee. Of course, the beneficiary of the life insurance policy must qualify as a plaintiff under the appropriate wrongful death statute or else the insurer's status as a subrogee is worthless. Mitchell argues that "key person" life insurance for business executives should give rise to subrogation rights for the insurer, because such contracts are unquestionably in the nature of indemnity instruments. [FN123] In American jurisdictions, however, this right would be completely empty, because a decedent's employer is nowhere accorded rights of recovery under wrongful death statutes. [FN124] If subrogation were essentially restitution for an insurer having paid, then one would expect that life insurers could qualify as subrogees.

Mitchell is not entirely consistent in his treatment of the Restitutionary Hypothesis. Andrew Burrows has argued that the function of restitution is not to undo unjust enrichments that have already taken place, but that the function of the law of subrogation is to prevent unjust enrichment from taking place at all. [FN125] Mitchell responds by writing:

Given that the rationale underlying the award of simple subrogation is the prevention of unjust enrichment, though, and given also that the guiding principle of the law of restitution is the reversal of unjust enrichment, it may at least be said that the remedy's proper place is alongside the law of restitution, if not squarely within it. [FN126] Mitchell's blithe response to Burrows gives up the game, although Mitchell doesn't seem to realize it. Mitchell is actually attempting to give an analysis of the nature of the law of subrogation in terms of its being a species of the genus restitution; it then will not suffice to say that *1398 subrogation is very much like restitution, that subrogation is a conceptual neighbor of restitution, or that subrogation is somehow a near-relation of restitution. Courts may excusably say this sort of thing, in passing. Scholars who purport to be applying the rigorous techniques of analytic jurisprudence may not. This point is no mere quibble. Mitchell believes that his analysis will provide a road map for how to develop the law of subrogation in the future. His road map is quite simple: Look to the principles of restitution. [FN127] But that road map only works -- it is only reliable -- if subrogation really is a type of restitution. Mere family resemblance is not sufficient.

Mitchell is certainly right that the conceptual space in which subrogation should be located is very close to that of restitution. It is also true that subrogation and restitution are involved in a complex and subtle dialectic. In addition, it is true that the two principal functions of subrogation -- preventing the unjust enrichment of PL and preventing the unjust enrichment of RH -- no matter what their order of priority, are restitutionary in nature. Thus, subrogation is based on a social policy to avoid unjust enrichment. [FN128] But it is also based on social policies that liability should follow fault, or at least product defect, and that injured persons should not be overcompensated. These two social policies, when worded this way, are not so clearly restitutionary in nature. One of them links liability for damages with wrongful, socially disapproved conduct. The other pussyfoots around legal limitations on damages and the Principle of Indemnity from the law of insurance. These are not necessarily equitable principles. They are not necessarily principles of the law of restitution. They are just as likely to be principles of (or, policies underlying) purely legal remedies.

Conclusion

Books like Mitchell's are worthwhile, I suppose. Subrogation is an important, if rather dull, topic. Some high-dollar adjudications and many more significant settlements are based upon it, and executives in the property insurance industry commonly say that subrogation recoveries make the difference between profits and losses. [FN129] So, for theoretical and practical *1399 reasons, subrogation needs contemplation, exploration, and exposition. Unquestionably, subrogation is closely linked to restitution in a variety of complex ways. Mitchell is right to think so. Nevertheless, one must appreciate the richness and variations within the law of subrogation before one attempts a reduction, and there are many contrasting -- even contradictory -- themes.

Perhaps a really adequate treatment of subrogation must begin at an even deeper level than scholars and courts are used to. Everyone, everywhere, without exception, agrees that subrogation means substitution, so that if A is subrogated to B, then A is substituted for B. Recently, the Texas Supreme Court held that a bank which lent money to pay a federal tax lien was subrogated to the government and so might foreclose a federal tax lien upon a homestead. [FN130] Texas has a very strong policy against foreclosures upon homesteads, so there is at least as strong a policy in Texas favoring the full substitution of subrogees for subrogors. Four years ago, however, this idea collided head-on with the fundamentals of personal jurisdiction in a Texas case, *Guardian Royal Exchange Assurance Ltd. v. English China Clays, P.L.C.* [FN131] A man was killed in South Texas. He sued his employer there for the punitive damage component of recovery authorized by the law of gross negligence and the Workers' Compensation Act. The employer had two liability insurers -- one American, one British. The British insurer denied coverage, but the American insurer defended and settled the case. Subsequently, the American insurer sued the British insurer for reimbursement. The device was subrogation, and the American insurer proceeded in the name of the insured. Apparently, the American insurer thought the British insurer had wrongfully denied the claim. It sued the British insurer in the same county in which the underlying case was processed. [FN132]

The British insurer specially appeared, arguing that the Texas court lacked personal jurisdiction. The trial court dismissed the case; the court of appeals reversed; but the Supreme Court of Texas reversed again, and found no personal jurisdiction. It reasoned, in part, that the case was really a dispute between two insurers, the family of the decedent having been paid and the insured having been protected. The Court implied that the correct resolution might be different if the employer-

insured, a Texas corporation, had any real interest in the outcome of the case. [FN133]

This case has a significant implication: Subrogation is no longer through-and-through substitution. S no longer steps completely into the *1400 shoes of RH; manifestly, it does not for the purposes of determining personal jurisdiction. This holding was no accident; the court knew exactly what it was doing. It had to. There was a dissent which pointed out the consequences of the majority's view of subrogation. [FN134] There was a way for the court to achieve its result and preserve the status quo in the fundamental conceptual structure of subrogation. It could have substituted the American insurer for its Texas insured, measured the rights of the British insurer against its insured (instead of the co-insurer), and then assessed whether an injustice would thereby be done to the British insurer.

But the court did not do this. Instead, it refused to make the substitution called for by the nature of subrogation as theretofore conceived. [FN135] The court thereby made the substitutionary foundation of subrogation discretionary, not automatic.

Perhaps the result in *Guardian Royal* was right. To be sure, judgments about personal jurisdiction which impact the international system must take factors into account which are alien to purely domestic, interstate personal jurisdiction decision making. Nevertheless, an influential jurisdiction has transformed the fundamental conceptual structure of subrogation. A new wrinkle has been added. The puzzle has acquired a new piece. Why? What does it mean? Is *Guardian Royal* simply a mistake? Is it a harbinger of things to come? Does it suggest that subrogation as substitution is not so deeply embedded in the law as most people thought? These are not questions which can be answered by the sort of conceptual analysis characteristic of analytic jurisprudence, if they can be answered at all. Indeed, they invite speculation that the role of analytic jurisprudence is sharply limited by the sort of historicism which is inherent in the law.

An energetic effort is not the same as an excellent book, alas. The Oxford University Press has, for generations, been one of the most distinguished publishers of scholarly books in the English-speaking world. [FN136] Legal treatises from its Clarendon Press are law books one expects to be elegant, rich in texture and ideas, extraordinary, and profound. [FN137] The jacket of *The Law of Subrogation* says "Clarendon Press Oxford." The old adage remains true: Don't judge a book by its cover.

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[FNr]. Hereinafter cited by page number only.

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[FN1]. E.g., *Tobacco Companies Seek Summary Judgment in Texas Preemptive Suit*, Mealey's Litig. Rep.: Tobacco, Mar. 21, 1996, at 21; *Tobacco Industry Documents from 1994 Recently Filed with Mississippi Court*, Mealey's Litig. Rep.: Tobacco, Mar. 7, 1996, at 9; *Health Insurer Has No Standing in Minnesota Suit*, Tobacco Industry Argues to High Court, Mealey's Litig. Rep.: Ins., Nov. 20, 1995, at 14.

[FN2]. Analytic jurisprudence focuses upon logic, the analysis of meaning, the rigorous extraction of legal principle from case law, and coherent systematization à la the Restatements. The danger inherent in analytic jurisprudence is that it will ignore history, psychology, social tendencies, public policy, and economics. The pathology of analytic jurisprudence is Formalism with its passions for clarity, completeness, and consistency. See Raymond A. Belliotti, *Justifying Law* 3-16 (1992). The great love of analytic jurisprudence is deductive-like logic, and its enemy is somewhat indistinct yet luminous intuition. Analytic jurisprudence has two opposites. One is Legal Realism, which submits that law is never even akin to some perfect statute-like system etched in metaphysical space, but is instead an authoritative specification of public policy worked out again and again, through time, by various organs of government. See generally Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 169-92 (1992); Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); William Twining, *Karl Llewellyn and the Realist Movement* (1973); see also James Hurget, *American Jurisprudence 1870-1979* (1990); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973). There is a new account of Legal Realism which emphasizes its connection to the social sciences. See John H.

Schlegel, *American Legal Realism and Empirical Social Science* (1995). Another recent history of the movement accentuates its relationship to the Yale Law School. See Laura Kalman, *Legal Realism at Yale 1927-1960* (1986). Analytic jurisprudence's other opposite is the sort of historicism typified by Henry Maine. See Henry S. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (new ed. 1930); see also J.W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* 137-78 (1970) (discussing Henry Maine); Peter Stein, *Legal Evolution: The Story of an Idea* 86-115 (1980) (discussing Maine's Ancient Law). See generally Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 *Tex. L. Rev.* 645 (1985).

My father tells a story from the early days of his law practice that nicely illustrates the battle between Realism and Formalism. In 1929, Dad went to work in a Kansas City, Missouri, law firm, where Charles Whitaker was also a lawyer. Whitaker, who later became an Associate Justice on the Supreme Court of the United States, and a group of more senior lawyers represented the Kansas City Star. My father was asked by Whitaker to prepare a legal memorandum on an issue of newspaper law then pending before the Supreme Court. Dad was by nature a Realist, as well as a realist, so he wrote a memorandum predicting how each justice then on the Supreme Court would vote. This approach is a classically Realist one, but for obvious reasons it is profoundly antithetical to the spirit of Formalism and analytic jurisprudence. The memorandum scandalized Dad's seniors, including Whitaker, and they were not mollified in the slightest by the fact that the young associate predicted every single vote correctly. James Patrick Quinn left the firm and went on to a distinguished career before the trial bar presenting cases on behalf of civil plaintiffs and criminal defendants. The firm of Watson Ess has done okay, too. I leave to a historian to verify (or falsify) this edifying tale.

[FN3]. E.g., Ellis v. Powe, 645 So. 2d 947, 951 (Miss. 1994).

[FN4]. See Bales v. Warren County, 478 N.W.2d 398, 401 (Iowa 1991) (holding that the subrogation claim was subject to reduction for the contributory fault of the subrogor); Boyer v. Trinity Universal Ins. Co., 576 So. 2d 444, 447-48 (La. 1991) (allowing the target to assert the defense of res judicata against the subrogee when the subrogor's claims had been dismissed and no appeal had been taken); St. Paul Fire & Marine Ins. Co. v. Glassing, 887 P.2d 218, 221 (Mont. 1994) (enforcing the statute of limitations against the subrogee); Holloway v. State, 593 A.2d 716, 720 (N.J. 1991) (enforcing the statute of limitations against the subrogee).

[FN5]. P. 3.

[FN6]. P. 5.

[FN7]. These acronyms are Mitchell's. P. 5. For an interesting discussion of subrogation and the primarily liable party, see Employer's Health Ins. v. General Casualty Co., 469 N.W.2d 172, 181 (Wis. 1991) (holding that one secondarily liable insurer may not subrogate against another). See also Cunningham v. Metropolitan Life Ins. Co., 360 N.W.2d 33, 36-39 (Wis. 1985) (providing an excellent summary of subrogation law).

[FN8]. Thankfully, Mitchell does not attempt to provide an ontology of rights.

[FN9]. Another pattern of subrogation is found in the law of liens. When an asset is subject to more than one lien, one of them is senior and the others are junior. The junior liens are, usually, capable of being ranked, so that some of them are senior to others. Thus, in a situation in which a piece of real property has three mortgages, the first mortgage would be the senior lien and subject to it there would be two junior liens, one of which would be senior to the other. If the most junior mortgagee purchased the position of the senior lienor, it would become subrogated, at least under many circumstances, to the security interest of the senior lienor and would, thereby, jump ahead of the more senior of the two junior liens. This is an instance of reviving subrogation because, if the most junior lienor purchased the position of the senior lienor, the mortgagor would be discharged from his debt to the senior mortgagee. For a recent discussion of these problems, see G.E. Capital Mortgage Serv., Inc. v. Levenson, 657 A.2d 1170, 1175 (Md. 1995) (examining a situation in which one "pays for the mortgage of another and takes a new mortgage as security"). See also Brooks v. Resolution Trust Corp., 599 So. 2d 1163, 1165-66 (Ala. 1992) (granting the purchasers' request for equitable subrogation to the rights of the senior lienholder when the purchasers discharged a debt to the senior

lienholder without knowledge that an intermediate vendor mortgaged the property to a junior lienholder); In re Bloomquist, 523 N.W.2d 352, 357-61 (Neb. 1994) (requiring a hospital with a statutory lien on an indigent patient's recovery from a third-party tortfeasor to pay its prorated share of the legal expenses incurred in the patient's action against the tortfeasor); Dedes v. Strickland, 414 S.E.2d 134, 136 (S.C. 1992) (denying equitable subrogation when "[t]here is no showing of any direct interest necessitating discharge of the debt or lien" and "[t]he record is silent as to what secondary liability [the would-be subrogor] could have had for [the original debtor's] debt secured by its own first mortgage lien"); First Nat'l Bank v. O'Dell, 856 S.W.2d 410, 410 (Tex. 1993) (refusing to apply the equitable subrogation doctrine to allow the extension of prior liens and the cancellation of notice provisions unless the maker of the renewal note is liable on the original note).

[FN10]. Pp. 3-15.

[FN11]. P. 4.

[FN12]. P. 9.

[FN13]. Whether S may proceed upon tort theories or is restricted to contract theories is one of the crucial issues in many subrogation cases in which there is no bodily injury to a person. In the lingo of the trade, this is known as the "Robins Dry Dock Problem." Mitchell makes no allusion to it. In admiralty jurisdiction it has long been the rule that ordinary plaintiffs could not recover mere economic losses based upon tort theories in the absence of physical injury. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308-09 (1927) (Holmes, J.); East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 874 (1986). This is also a standing rule in dry-land torts in virtually all jurisdictions, Guste v. M/V Testbank, 752 F.2d 1019, 1022 (5th Cir. 1985), both in the United States and in England. P.S. Atiyah, *Negligence and Economic Loss*, 83 L.Q. Rev. 248, 248-52 (1967). The rise of product liability tort theories did not change the situation. Economic losses alone were not, in general, recoverable. 2 Marshall S. Shapo, *The Law of Products Liability* 27-3 to 27-48 (2d ed. 1990). A distinctive problem arose in products (and related) cases, however. If a thing simply wears out, this is economic loss to be handled by the law of warranty. If a thing violently and catastrophically destroys itself, on the other hand, this is not so obviously mere economic loss. Nevertheless, courts have now almost universally concluded that self-destruction by a product is economic loss only. See Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1198-1201 (Del. 1992) (holding that when a product has only damaged itself, a plaintiff may only recover for economic loss notwithstanding the existence of privity of contract); see also Arkwright-Boston Mfg. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174, 1177-78 (5th Cir. 1988) (applying Texas law in concluding that the plaintiff insurance company could not recover in tort for economic losses resulting from the sudden and catastrophic failure of a defective product). But see People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 118 (N.J. 1985) (holding that a plaintiff may recover for economic loss in the absence of physical damages when the defendant could have foreseen that the plaintiff was within the scope of the risk created by the defendant's negligence).

If S is restricted to contract damages in a case in which a large machine destroys only itself and perhaps causes lost profits, S's case is likely to have little value. For the most part, large industrial machines -- turbines, generators, transformers, lifts, furnaces, punch presses, conveyor systems, boilers, and so forth -- are sold pursuant to extensively negotiated contracts that are nevertheless almost invariably quite restrictive when it comes to remedies. Manufacturers warrant their machines for relatively short periods; the warranties are frequently conditioned upon user performance and repair criteria which are seldom met; implied warranties of merchantability and fitness are disclaimed; damages are capped; and sometimes limitations periods are shortened. Often the manufacturers stay involved with their customers. They receive fees for inspecting the equipment periodically, for issuing various sorts of information bulletins, for repairing the machinery, and for consulting on the proper use of the equipment. Yet vendor companies carefully -- sometimes by agreement but often by disclaimer -- avoid or stringently limit contract remedies for these services.

Under these circumstances, when a boiler blows up, a turbine tears itself apart, or a product-like building burns down, the property insurer pays but frequently cannot subrogate. It is denied the use of tort remedies by the economic loss rule, and contract remedies have been bargained away. In the post-modern world where intangible assets are as or more valuable than physical assets, this rule makes little sense. For better or for worse, however, that page of the law has already been written in

black ink.

[FN14]. But see Dedes v. Strickland, 414 S.E.2d 134, 136 (S.C. 1992) (requiring that “[n]o injustice will be done to the other party by the allowance of” equitable subrogation).

[FN15]. The concept of unjust enrichment is, by its terms, locked together with the concept of justice. The concept of social justice is, of course, notoriously obscure and highly controversial. For some recent point and counterpoint, see James P. Sterba et al., *Morality and Social Justice: Point/Counterpoint* (1995). To some degree, this book is a discussion of James P. Sterba, *How to Make People Just* (1988), in which he argued that the five contemporary conceptions of justice all support the same practical requirements. Since John Rawls published *A Theory of Justice* and Robert Nozick responded in *Anarchy, State, and Utopia*, the intellectual landscape has been dotted with discussions of justice, as perhaps never before in intellectual history. Among the most interesting contributions are the works of Brian Barry. See generally Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (1973); Brian Barry, *A Treatise on Social Justice* (1989). Law professors are active participants in this dialogue. See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* (1980). Many of these theories are placed in juxtaposition in David Mapel, *Social Justice Reconsidered: The Problem of Appropriate Precision in a Theory of Justice* (1989). Much of this work concerns the proper foundations for a correct account of distributive (as opposed to retributive) justice.

If Mitchell were to protest that he did not mean to be importing grand theories of social justice into the discussion by the way he formulated Condition (3), two responses would be in order. First, such a protest is a confession of Condition (3)’s inadequacy. Analyses should move from the less to the more clear. Second, the protest would be wrong. Subrogation, if it is attached to restitution, has to be connected to unjust enrichment somehow. This sort of injustice, in the end, is attached to larger social and philosophic issues. That is why restitution is a generative idea. Clearly the maxim, Restitution exists to right unjust enrichments, pertains to distributive justice. Although each case will proceed, as it were, at a “micro”-level, the theory of restitution must presuppose a theory of distributive justice. Perhaps the real problem is deeper. The game of teaching law to first-year students is predicated upon the implicit proposition that legal concepts are subject to finished, rigorous, necessary-and-sufficient conditions analysis. In the end, of course, few are. This is why nothing even the best first-year law students say is ever really right. The triangular tension between (i) the flexibility and indeterminacy of legal concepts, (ii) the complexity of the life-world, and (iii) the demands of philosophic analysis provides some of the sources of professional delight, student excitement, and later legal creativity by everyone.

[FN16]. E.g., Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 775 (Ala. 1990); Rowe v. St. Paul Ramsey Medical Ctr., 472 N.W.2d 640, 644 (Minn. 1991); Vogt v. Schroeder, 383 N.W.2d 876, 879 (Wis. 1986).

[FN17]. Robert H. Jerry, II, *Understanding Insurance Law* s 96(c) (1987).

[FN18]. See, e.g., Youngblood v. American States Ins. Co., 866 P.2d 203, 205 (Mont. 1993).

[FN19]. P. 12.

[FN20]. See, e.g., Aetna Casualty & Sur. Co. v. Turner, 662 So. 2d 237, 239 (Ala. 1995) (“Subrogation is based on two equitable principles: (1) that the insured should not recover twice for a single injury, and (2) that the insurer should be reimbursed for payments it made that, in fairness, should be borne by the wrongdoer.”); Rowe, 472 N.W.2d at 644 (stating the policies underlying subrogation to be “(1) to prevent double recovery, and (2) to allocate payment according to fault”); Youngblood, 866 P.2d at 205 (“The purpose of subrogation is to prevent injustice by ‘compel[ling] the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it. It is an appropriate means of preventing unjust enrichment.’” (quoting Bower v. Tebbs, 314 P.2d 731, 736 (Mont. 1957))); Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., 498 N.W.2d 333, 335-36 (Neb. 1993) (“Subrogation is an equitable doctrine applied in order to avoid unjust enrichment when one party has discharged an obligation which should have been satisfied in whole or in part by another.”).

[FN21]. P. 7.

[FN22]. P. 81.

[FN23]. P. 82. According to Mitchell, at least one court has held that S is not getting its money back but is obtaining money paid by PL. See *Stearns v. Village Main Reef Gold Mining Co.*, 21 T.L.R. 236 (1905) (Eng.). What difference does it make?

[FN24]. P. 82.

[FN25]. [1993] 1 App. Cas. 713 (1992) (appeal taken from Eng.). One of the issues in Napier was whether the plaintiffs might obtain monies to which they had a right based upon subrogation from a settlement fund placed by the tortfeasors with the attorneys representing nearly 250 insureds. The insureds argued that the funds should be distributed to them and then S should make demand for it, and if necessary sue. The House of Lords, unlike the Court of Appeals, gave S access to the funds. The theory was equitable lien. Their Lordships got this part of the decision right.

[FN26]. This principle holds true in America as well. *Milbank Ins. Co. v. Henry*, 441 N.W.2d 143, 145 (Neb. 1989); see also *Martinez v. Continental Enter.*, 730 P.2d 308, 319 (Colo. 1986) (stating that the imposition of an equitable lien is appropriate only when one party has been unjustly enriched).

[FN27]. P. 83.

[FN28]. See, e.g., *In re Bloomquist*, 523 N.W.2d 352, 356 (Neb. 1994) (discussing the Nebraska hospital lien statute, which grants medical providers a lien upon a patient's recovery against the tortfeasor who caused the patient's injuries).

[FN29]. See, e.g., *Fellows v. Tlingit-Haida Regional Elec. Auth.*, 740 P.2d 428, 431 n.13 (Alaska 1987) (noting that application of the constructive trust doctrine guards against the windfall that would occur if a defendant who recovered contribution from a joint tortfeasor did not reimburse its indemnifying insurance carrier); *Bloomquist*, 523 N.W.2d at 360 ("Where the insured, having sustained a loss in excess of the amount he received from his insurance company, obtains compensation from the wrongdoer, the insured then holds the funds in trust for the insurance company."); *Embree Const. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 923 (N.C. 1992) (enumerating the establishment of a constructive trust among the remedies available against a person who has been unjustly enriched at the expense of another).

[FN30]. Pp. 82-83.

[FN31]. Francis Gurry, *Breach of Confidence* 417 (1984). An action for an accounting can also be used as a discovery device, i.e., to determine whether the defendant has misused funds. See, e.g., *Claire Murray, Inc. v. Reed*, 656 A.2d 822 (N.H. 1995) (seeking an accounting against an accountant).

[FN32]. See Gurry, *supra* note 31, at 418; see, e.g., *H.B. Zachry v. Terry*, 195 F.2d 185 (5th Cir. 1952) (reviewing an accounting of a dispute after three years of complex business transactions between a farm manager and owner).

[FN33]. See, e.g., *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29, 32 (Minn. 1992) (holding that an employer bringing a subrogation action under Minnesota's workers' compensation statute against a third-party tortfeasor must prove the nature and extent of its employee's damages); *Hudson v. Hudson Mun. Contractors, Inc.*, 898 S.W.2d 187, 190 (Tenn. 1995) (holding that *Tenn. Code Ann. s 50-6-112* imposes a subrogation lien in favor of an employer on any recovery by an employee on wrongful death claims covered by Tennessee's Worker's Compensation Law).

[FN34]. See, e.g., *Allstate Ins. Co. v. Beavers*, 611 So. 2d 348, 352 (Ala. 1992) (noting that "the purpose of the consent-to-settle clauses in the uninsured/underinsured motorist insurance context is

to protect the underinsured motorist insurance carrier's subrogation rights against the tort-feasor"); Allgood v. Grinnell Mut. Reinsurance Co., 509 N.W.2d 486, 487 (Iowa 1993) (holding that insurers retain "subrogation rights for uninsured motorist coverage against an insured's dramshop recovery"); Coots v. Allstate Ins. Co., 853 S.W.2d 895, 901 (Ky. 1993) (recognizing an underinsured motorist's insurer's statutory right of subrogation that, though not absolute, often allows recovery from the tortfeasor); Allstate Ins. Co. v. Karl, 437 S.E.2d 749, 757 (W. Va. 1993) (holding that a subrogation lien will lie to prevent double recovery by a policy holder); Arndt v. Burdette, 434 S.E.2d 344 (W. Va. 1993) (holding that a "consent to settle" provision is a valid and enforceable means by which an insurer may protect its statutorily mandated right to subrogate claims).

[FN35]. See, e.g., Carton v. Missouri Pac. R.R., 865 S.W.2d 635, 638 (Ark. 1993) (allowing the worker's compensation carrier to protect its statutory right to subrogation by intervening in a personal injury action against plaintiff's employer); Shweiri v. Commonwealth, 622 N.E.2d 612, 615 (Mass. 1993) (holding that the state statute requires that the Department of Public Welfare be subrogated to the Medicaid claimant's rights against third parties); Ehlers v. Perry, 494 N.W.2d 325, 333 (Neb. 1993) (reiterating a previous holding that statutory hospital liens attach at the time the patient is admitted to the hospital for treatment); Costello v. Geiser, 647 N.E.2d 1261, 1265 (N.Y. 1995) (holding that a county department of social services statutory subrogation right for medical expenses paid for pregnancy and childbirth for an indigent mother includes only the medical care furnished, not the bad debt or charity care subsidies).

[FN36]. See, e.g., Starry v. Central Dakota Printing, Inc., 530 N.W.2d 323, 326 (N.D. 1995) (applying Minnesota no-fault law and holding that subrogation rights to the insurer exist to the "extent basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss").

[FN37]. See, e.g., Pie Mut. Ins. Co. v. Ohio Ins. Guar. Ass'n, 611 N.E.2d 313, 316 (Ohio 1993) (exploring the applicability of subrogation principles to medical malpractice insurance).

[FN38]. See K-Mart Apparel Corp. v. Temples, 401 S.E.2d 5, 6 (Ga. 1991) (holding that a statute requiring an employer to compensate an employee for the consequences of a physician's malpractice, without giving the employer the corresponding right to subrogation, does not deny the employer procedural due process). If the state has an open courts provision in its constitution, and if the statutory scheme, such as worker's compensation, provides that the compensation carrier may recover before the injured is made completely whole, the statute may be unconstitutional. See Francetich v. State Compensation Mut. Ins. Fund, 827 P.2d 1279, 1285 (Mont. 1992) (holding that a state statute that allows an insurer full subrogation even though the claimant's damages exceed worker's compensation benefits and third-party recovery combined violates the Montana state constitution). Mitchell's treatment of subrogation says nothing about the variations federalism permits. Every statutory bar to subrogation, of course, raises at least potential constitutional issues. Federalism does not permit everything.

[FN39]. P. 74.

[FN40]. The collateral source rule is the law almost everywhere in America. Under that rule, if A is tort victim, B is the tortfeasor, and C gives money to A as the result of injury caused by B, A may still sue B in tort. This is true whether C is an insurer, relative, friend, or someone else. See generally James L. Branton, The Collateral Source Rule, 18 St. Mary's L.J. 883 (1987); Daena A. Goldsmith, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation, 53 J. Air L. & Com. 799 (1988).

[FN41]. See Robert W. Emerson, Insurance Claims Fraud Problems and Remedies, 46 U. Miami L. Rev. 907, 913 (1992) ("Studies seem to confirm the hypothesis: [Insurance f]raud is rampant."); Alan R. Miller & Charles B. Mitchell, Jr., Lie Once and Lose, The Brief, Spring 1993, at 14, 14 ("The Insurance Information Institute reported in February 1992 that the most widely accepted estimate of the extent of insurance fraud in 1990 was ten percent of the total claim dollars in the property/casualty insurance industry.").

[FN42]. P. 74.

[FN43]. Federalism creates two types of problems. One arises out of the relationship between the national government and the states. The other problem is that there are many semi-sovereign states. State sovereignty is especially important in the area of private law. The two kinds of federalism create different kinds of problems. Between the nation and the state, for example, ERISA preempts state bad faith claims against many health carriers. Auto Club Ins. Ass'n v. Fredrick & Herrud, Inc., 505 N.W.2d 820, 833 (Mich. 1993). State-state federalism simply creates variations in the law. See American Family Mut. Ins. Co. v. Farmers Ins. Exch., 504 N.W.2d 307, 308 (N.D. 1993) (holding that contractual conflict-of-law clauses do not bind third parties sued by an insurer in subrogation); Stevens v. Merchants Mut. Ins. Co., 599 A.2d 490, 491 (N.H. 1991) (applying the law of the state where the car was garaged rather than the location of the accident in uninsured-motorist subrogation); Stamp v. Department of Labor and Indus., 859 P.2d 597, 600 (Wash. 1993) (applying the law of the forum state, rather than that in which the subrogation is sought). Lovers of social experimentation usually love state-to-state variations.

[FN44]. P. 3.

[FN45]. McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., 515 S.W.2d 32 (Tex. Civ. App. -- Dallas 1974, writ ref'd n.r.e.) (quoting E.Y. Chambers & Co. v. Little, 21 S.W.2d 17, 22 (Tex. Civ. App. -- Eastland 1929, writ ref'd) (quoting Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America s 635 (Boston, Hilliard, Gray 1836))).

[FN46]. See Educators Mut. Ins. Ass'n v. Allied Prop. & Casualty Ins. Co., 890 P.2d 1029, 1030 (Utah 1995) ("Subrogation is a creature of equity, its purpose is to work out an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who, in equity and in good conscience, ought to pay it." (quoting Allstate Ins. Co. v. Ivie, 606 P.2d 1197, 1202 (Utah 1980))).

[FN47]. Jeffrey W. Stempel, Interpretation of Insurance Contracts s 18.2 (1994).

[FN48]. See *id.* (listing four different ways courts have defined actual cash value).

[FN49]. *Id.*

[FN50]. In Trimble v. ITZ, 898 S.W.2d 370 (Tex. App. -- San Antonio 1995, writ denied), the Court of Appeals held that a fire insurance company could not be subrogated to its insured's right to statutory multiples under the Texas Deceptive Trade Practices Act. The court reasoned that only a "consumer" could have standing in such an action. In effect, the court stated that subrogation could not transfer the insured's right, if any, to a multiple penalty-type award to the insurer, because it could not transfer its status as a consumer. The Texas Supreme Court denied the petitioners application for writ of error in a per curiam opinion, which bore the notation, "The Court neither approves nor disapproves of the Court of Appeals' discussion of the Deceptive Trade Practices Act." Trimble v. ITZ, 906 S.W.2d 481, 481 (Tex. 1995).

[FN51]. Then again, an insurer may be subrogated only for items in categories it insures. See McGranahan v. McGough, 820 P.2d 403, 410-11 (Kan. 1991) (interpreting the Kansas worker's compensation law to allow subrogation of pain and suffering but not the worker's spouse's claim for loss of services). Perhaps an insurer that does insure against being injured in a grossly negligent or intentional way should be able to recover such damages if it has paid the claim. No such insurance exists, and it is difficult to fathom its economic function.

[FN52]. Federal Ins. Co. v. Starr Elec. Co., 410 S.E.2d 684, 687 (Va. 1991).

[FN53]. Legion are the cases that employ shoe imagery to explain subrogation. It is a helpful -- if hackneyed -- image, because it conveys the idea of substitution. It also conveys the idea that the subrogee cannot have more than the subrogor. If the subrogee's shoes are old, scuffed, worn, beset by holes in their soles, down at the heels, or smelly, then -- metaphorically speaking -- so are the

insurer's. See Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622, 624 (Ill. 1992) ("One who asserts a right of subrogation ... step [[s] into the shoes of ... the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce."); see also Wilkinson v. Boats Unlimited, Inc., 670 A.2d 1296, 1302 (Conn. 1996) (holding that an insurer-subrogee may not use its own residency to provide personal jurisdiction over a foreign defendant, but must be subject to the defenses against the subrogor, which lacked the residency requirements to sue the foreign defendant in a Connecticut court). Consistent with the metaphor, S must "step" into the shoes -- or, at least, walk in them. RH has no duty, for example, to provide suits from which S will profit. See Aetna Casualty & Sur. Co. v. Sullivan, 607 A.2d 879, 881 (R.I. 1992) (holding that a Rhode Island statute "absolves the insured from bringing an action against the uninsured tortfeasor as a prerequisite to making a claim against his or her insurance"). This archetype may not apply when S is the government. See United States v. California, 507 U.S. 746, 759 (1993) (suggesting that the United States could impose a duty upon its contractors to sue for wrongly assessed state taxes in order to keep the federal right of subrogation alive). Mitchell does not discuss this tantalizing thought. And there is another problem with shoe imagery. In theory, the maxims of equity regulate someone's becoming a subrogee. If so, and if this doctrine applies to insurance subrogation, an insurer may not become a subrogee if it has behaved improperly in relevant ways. Although I know of no authority for this view, perhaps bad faith delays in paying claims might destroy subrogation. The idea is at least prima facie consistent with equitable principles. But how can these ideas be captured in foot and shoe imagery?

[FN54]. See Kenneth S. Abraham, *Insurance Law and Regulation: Cases and Materials* 201 (1990) (noting that "an insurer cannot have subrogation against its own insured"). Jeffrey Stempel also points out that permitting subrogation by a property carrier against its insured would "violate the functional purposes of insurance, [because] the insurer could avoid coverage due to the policyholder's negligence." Stempel, *supra* note 47, s 21.1. It is generally understood that one of the functions of property insurance is to protect the insured against his own negligence.

[FN55]. Cf. Jindra v. Clayton, 529 N.W.2d 523, 527 (Neb. 1995) (holding that a joint tenant's insurer cannot pursue a subrogation action against the other joint tenant).

[FN56]. See, e.g., Bannock Bldg. Co. v. Sahlberg, 887 P.2d 1052, 1056 (Idaho 1994) (announcing that whether a lessee is a co-insured and therefore not subject to subrogation claims is to be determined on a case-by-case basis); Aetna Casualty & Sur. Co. v. Barasch, 603 A.2d 380, 381 (Vt. 1992) (holding that no right of subrogation exists against an invitee absent a landlord/tenant relationship). For a well-reasoned opinion reviewing cases and other materials, see Neubauer v. Hostetter, 485 N.W.2d 87, 90 (Iowa 1992) (allowing insurer to pursue subrogation claim against tenant). See also LaFramboise, 597 N.E.2d at 626 (holding that where the parties agreed that the tenant was not responsible for fire damage to the property, no right of subrogation would exist against the tenant); Home Ins. Co. v. National Tea Co., 588 So. 2d 361, 365-66 (La. 1991) (finding that the lessor's explicit release of the lessee from any claims of fire damage destroyed any rights the insurer could claim in subrogation); Community Credit Union v. Homelvig, 487 N.W.2d 602, 605 (N.D. 1992) (mandating that, absent an express agreement, a tenant is implicitly a co-insured under the landlord's policy and therefore immune from subrogation claims).

[FN57]. Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., 498 N.W.2d 333, 338 (Neb. 1993).

[FN58]. Continental Ins. Co. v. Bottomly, 817 P.2d 1162, 1165 (Mont. 1991). This is an odd result. If the house had burned down completely by accident, the non-owning brother would not have a claim for proceeds under the policy.

[FN59]. E.g., Richards v. Allstate Ins. Co., 455 S.E.2d 803, 805 (W. Va. 1995).

[FN60]. See Industrial Risk Insurers v. Garlock Equip. Co., 576 So. 2d 652, 656 (Ala. 1991) ("[A]n owner does not retain subrogation rights against a negligent contractor or subcontractor, when the owner's builder's risk insurance policy contains a 'waiver of subrogation' clause."); Home Ins. Co., 588 So. 2d at 364-65 (holding that a lease provision releasing a lessee from claims and damages arising from a fire precluded any subrogation recovery by the lessor's insurer); Chadwick v. CSI, Ltd.,

629 A.2d 820, 826 (N.H. 1993) (upholding the validity of a subrogation waiver "even though that person or entity would otherwise have a duty of indemnification"); Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 831 P.2d 724, 728 (Wash. 1992) ("Parties to a contract may waive their subrogation rights and, absent fraud, the waiver will be valid and enforceable."). Of course, if S insures RH against x and RH releases PL for y, then the release is immaterial. See Conley Transp., Inc. v. Great Am. Ins. Co., 849 S.W.2d 494, 495 (Ark. 1993) (holding that a release of a claim for injury resulting from or relating to property damage was really a waiver of the claim for lost net income, and did not preclude the insurer's right of subrogation for damages to the truck); see also McDonald v. Southeastern Fidelity Ins. Co., 606 So. 2d 1061, 1067-68 (Miss. 1992) (finding that the insurer's payment to the insured for injury to the insured's jeep transferred all rights to the claim against the responsible party, so that the insured's subsequent general release of all claims did not include, and would not preclude, the subrogated rights of the insurer). But see Ellis v. Powe, 645 So. 2d 947, 952 (Miss. 1994) (holding that a general release would not defeat the insurer's subrogation rights if the insured informed the tortfeasor that the settlement would not bind the insurer). For an unusual case that begins with the problems created by a release, see Franxch v. Ankey, 670 A.2d 951 (Md. 1996).

[FN61]. See Ellis, 645 So. 2d at 952.

[FN62]. Pp. 108-09.

[FN63]. See Oss v. United Servs. Auto. Ass'n, 807 F.2d 457, 459 (5th Cir. 1987) ("If, before the insurer pays any benefits, the insured releases the tortfeasor from further liability ... [the] Insure[r] [is] discharged from [[[the] obligation to pay the insured to the full extent to which the insured has defeated the right of subrogation.").

[FN64]. E.g., Allstate Ins. Co. v. Amerisure Ins. Co., 603 So. 2d 961, 966 (Ala. 1992); Krohn v. Gardner, 533 N.W.2d 95, 98 (Neb. 1995).

[FN65]. See Onaway Trans. Co. v. Offshore Tugs, Inc., 695 F.2d 197, 201-02 (5th Cir. 1983) (holding that overpayment made in ignorance of the fact that it is excessive is recoverable without showing unjust enrichment); Commercial Union Ins. Co. v. Postin, 610 P.2d 984, 989-90 (Wyo. 1980) (defining the "volunteer doctrine" to exclude situations where the insurer lacked full knowledge, acted involuntarily, was under duress, or suffered from the fraud of others); cf. United States v. Edmondston, 181 U.S. 500, 514-15 (1901) (finding that voluntary overpayment to the federal government for land did not give rise to a lawful claim for repayment absent deceit or misrepresentation by a government official).

[FN66]. P. 105.

[FN67]. See Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167-68 (Tex. 1987) (holding that there is a "duty on the part of insurers to deal fairly and in good faith with their insureds," and that the breach of this duty could give rise to exemplary and mental anguish damages); Tex. Ins. Code Ann. art. 21.21, § 16a (Vernon 1981) (creating a cause of action for unfair and deceptive practices in the insurance business); Tex. Bus. & Com. Code Ann. § 17.50(a)(4) (Vernon 1987) (creating a cause of action for consumers for violations of the Texas Insurance Code). As long as there is a realistic threat of bad faith, it may be difficult for the party insurer ever to be a volunteer. For an interesting discussion of the relationship between bad faith and subrogation, see Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1112-14 (Okla. 1992).

[FN68]. E.g., Gaub v. Simpson, 866 P.2d 765, 767-68 (Wyo. 1993); see also Auto Club Ins. Ass'n v. New York Life Ins. Co., 485 N.W.2d 695, 698 (Mich. 1992) ("[I]t is clear that [the insurer] was protecting its own interests and did not act as a volunteer when it paid the medical expenses of its insured.").

[FN69]. See, e.g., Northern Util. Div. of KN Energy, Inc. v. Evansville, 822 P.2d 829, 835 (Wyo. 1991) (stating that "a volunteer cannot recover on a legal theory of subrogation" but then finding that the insurance company in the case did not qualify for volunteer status).

[FN70]. See Stephen S. Ashley, *Bad Faith Actions: Liability and Damages* 77 (1984 & Supp. 1992); John C. McCarthy, *Punitive Damages in Bad Faith Cases* (3d ed. 1983).

[FN71]. See Jeffrey S. Green & Ira Tripathi, *Coping with Chaos: The World Trade Center Bombing and Recovery Effort*, 27 *Urb. Law* 41, 48-53 (1995) (highlighting the many cases filed against the Port Authority of New York as a result of the World Trade Center bombing).

[FN72]. [1896] App. Cas. 250 (appeal taken from Queensland).

[FN73]. P. 106.

[FN74]. P. 6.

[FN75]. E.g., *Arkwright-Boston Mfg. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174 (5th Cir. 1988); *Northland Ins. Co. v. Union Pac. R.R. Co.*, 830 S.W.2d 850 (Ark. 1992); *Patrons Mut. Ins. Ass'n v. Union Gas Sys. Co.*, 830 P.2d 35 (Kan. 1992); *St. Paul Fire & Marine Ins. Co. v. Glassing*, 887 P.2d 218 (Mont. 1994); *Aetna Casualty & Sur. Co. v. Barasch*, 603 A.2d 380 (Vt. 1992); see also June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 *N.C. L. Rev.* 893, 900 (1990) (elucidating the modern "real party in interest rule" and noting that the Field Code of 1848 eliminated the need for an assignee to bring suit in the name of the assignor).

[FN76]. E.g., *Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc.*, 649 P.2d 234, 238 (Alaska 1982).

[FN77]. See *Fed. R. Civ. P. 17(a)* (requiring that real parties in interest be identified).

[FN78]. P. 42.

[FN79]. See *infra* notes 82-83.

[FN80]. See, e.g., *Complete Health, Inc. v. White*, 638 So. 2d 784, 786 (Ala. 1994) (holding that the insurer has no subrogation rights where a settlement did not fully compensate the insured); *Egros v. Pempton*, 606 So. 2d 780, 784 (La. 1992) (holding that if the "insurer pays the whole obligation, it is completely subrogated to the insured's rights against the tortfeasor"); *Shelter Ins. Co. v. Froelich*, 498 N.W.2d 74, 81 (Neb. 1993) ("[I]n the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss."); *Bonte v. American Global Ins. Co.*, 618 A.2d 825, 827 (N.H. 1992) (holding that subrogation is restricted to instances when the amounts recovered from tortfeasors create overlapping recovery and that this cannot occur until the plaintiff is fully compensated); *West Virginia ex rel. State Auto Mut. Ins. Co. v. Steptoe*, 438 S.E.2d 54, 58 (W. Va. 1993) ("The right of subrogation in West Virginia ... is not available where the policyholder has not been fully compensated for the injuries received"); *Schulte v. Franzin*, 500 N.W.2d 305, 307 (Wis. 1993) (holding that "subrogation is to be allowed when the insured is compensated in full by recovery from the tortfeasor"). In *Alfa Mutual Ins. Co. v. Head*, 655 So. 2d 975 (Ala. 1995), the Alabama Supreme Court held that the "insurer has no right to subrogation unless and until the insured has been made whole for the loss." *Id.* at 977. Accordingly, if the insured has suffered two different kinds of losses, it must recover both of them before the insurer that covered one of them may recover anything through subrogation. Thus, if an individual sustains both bodily injury and property damage, the property carrier may recover nothing until its insured has been completely compensated for her bodily injury. Presumably, the same holds true if the insured suffered both property damage and economic loss.

[FN81]. *Id.*

[FN82]. Pp. 19-21.

[FN83]. See Elaine M. Rinaldi, Apportionment of Recovery Between Insured and Insurer in a Subrogation Case, 29 *Tort & Ins. L.J.* 803, 805-06 (stating that one approach to allocation of money is to prorate the recovery based on "the percentage of the original loss for which the insurer paid the insured under the policy").

[FN84]. See Robert E. Keeton & Alan I. Widdis, *Insurance Law* s 3.10(b) (1988); Rinaldi, *supra* note 83, at 811-14 (describing the "insurer-whole" approach as the minority position, accepted only by California, Idaho, Nebraska, Ohio, Virginia, and Wyoming).

[FN85]. Rinaldi, *supra* note 83, at 807.

[FN86]. For an account of this dispute, see Adam Raphael, *Ultimate Risk: The Inside Story of the Lloyd's Catastrophe* 113-34 (1995); Elizabeth Luessenhop & Martin Mayer, *Risky Business: An Insider's Account of the Disaster at Lloyd's of London* 182-83 (1995). For the history of Lloyd's at the early stages of its current problems, see Godfrey Hodgson, *Lloyd's of London* (1984) and Antony Brown, *Lloyd's of London* (1974).

[FN87]. P. 60; see also p. 42.

[FN88]. See, e.g., Winkelmann v. Excelsior Ins. Co., 650 N.E.2d 841, 842-45 (N.Y. 1995) (affirming summary judgment for an insurer who settled its subrogation claim against the tortfeasor after it had paid the insured to its policy limits, but before the insured could pursue its own action against the tortfeasor for damages suffered above the insured's policy limits).

[FN89]. See, e.g., Geico Ins. Co. v. Lyons, 658 So. 2d 445, 446 (Ala. 1995) (denying the insurer any right to proceed against the tortfeasor until the insured was fully compensated).

[FN90]. P. 174; see S.R. Derham, *Subrogation in Insurance Law* 95-101 (1985) (providing an interesting and detailed comparative study of English and Commonwealth cases).

[FN91]. P. 41.

[FN92]. Blue Cross & Blue Shield Mut. v. Hrenko, 647 N.E.2d 1358, 1359 (1995).

[FN93]. State Board of Insurance, *Quick Reference: Texas Homeowners Policy -- Form B*, at 14 (Mar. 1, 1993) (emphasis in original).

[FN94]. P. 173. Cf. Krohn v. Gardner, 533 N.W.2d 95, 98 (Neb. 1995) (distinguishing subrogation from assignment by noting that under the former, the subrogee's potential recovery is limited to the amount the subrogee has paid to the subrogor).

[FN95]. P. 174.

[FN96]. United States Inv. & Dev. Co. v. Rhode Island Dep't of Human Serv., 606 A.2d 1314, 1317 (R.I. 1992).

[FN97]. See 2 Fowler V. Harper et al., *The Law of Torts* s 24.1 (2d ed. 1986).

[FN98]. P. 174-75 (footnote omitted).

[FN99]. But see Higginbotham v. Arkansas Blue Cross & Blue Shield, 849 S.W.2d 464, 466 (Ark. 1993) (ruling that "it may be [that] equitable principles ... are appropriate to the doctrine of subrogation by operation of law ... but not where ... the right is one of ... subrogation by express agreement between the insured and the insurer").

[FN100]. See Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 106-07 (2d Cir. 1991) (applying Connecticut law and dismissing an excess insurer's claim for legal malpractice against a firm representing the insured); Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294,

297 (Mich. 1981) (using equitable subrogation to allow recovery by a client's insurer); American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484-85 (Tex. 1992) (permitting a legal malpractice suit by excess liability insurance carriers against the attorney hired by the primary carrier to represent the insured). In some states legal malpractice claims cannot be transferred by subrogation. See Bank of Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson, 827 P.2d 758, 764-66 (Kan. 1992) (holding that a legal malpractice claim could be neither subrogated nor assigned to the plaintiff bank).

[FN101]. This conclusion seems well established in some jurisdictions. See, e.g., Smith v. State Farm Mut. Auto. Ins. Co., 7 Cal. Rptr. 2d 131, 135 (Cal. Ct. App. 1992) ("The courts have barred assignment only of claims for punitive damages or emotional distress."); Southern Ry. Co. v. Malone Freight Lines, Inc., 330 S.E.2d 371, 377 (Ga. App. 1985) (holding that subrogees have no right to recover damages other than compensatory damages); see also Grunloh v. Effingham Equity, Inc., 528 N.E.2d 1031, 1037 (Ill. App. 1988) (citing the general common-law rule that actions for compensatory, but not punitive, damages survive the death of the owner and are assignable). In some jurisdictions, claims for mental anguish may not be assignable. See, e.g., Smith, 7 Cal. Rptr. 2d at 135.

[FN102]. Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 Mich. L. Rev. 841, 842 (1962).

[FN103]. See supra note 100.

[FN104]. See State Farm Mut. Auto. Ins. Co. v. Blng, 808 S.W.2d 304, 305-06 (Ark. 1991) (charging the insurer with a share of the insured's legal costs); County Workers Compensation Pool v. Davis, 817 P.2d 521, 526 (Colo. 1991) (apportioning attorney's fees among all beneficiaries of a fund created by the attorneys); Bowen v. American Family Ins. Group, 504 N.W.2d 604, 606 (S.D. 1993) (holding the subrogor liable for a proportionate share of the subrogee's attorney's fees); Summers v. Command Sys., Inc., 867 S.W.2d 312, 315-16 (Tenn. 1993) (holding an employer-subrogee liable for a pro rata share of the employee-subrogor's attorney's contingent fee); Boston, Bates & Holt v. Tennessee Farmer's Mut. Ins. Co., 857 S.W.2d 32, 35-36 (Tenn. 1993) (holding the insurer liable for reasonable compensation for the insured's lawyer).

[FN105]. See Boston, Bates, 857 S.W.2d at 34 (noting the "normal rule" that an attorney "must look only to his client" for compensation).

[FN106]. If the injured insured, RH, pursues the tort case against PL, and if his insurer, S, benefits, then S is charged with paying at least some of RH's attorney's fees. Jennings v. Nationwide Ins. Co., 669 A.2d 534, 536 (R.I. 1996).

[FN107]. See Alfa Mut. Ins. Co. v. Head, 655 So. 2d 975, 978 (Ala. 1995) (discussing the application of the common fund doctrine); Guardianship and Conservatorship of Bloomquist v. City of Lincoln, 523 N.W.2d 352, 359-60 (Neb. 1994) (holding that, where a minor patient was to pay hospital expenses out of a tort judgment, the common fund doctrine required the hospital to pay its pro rata portion of legal expenses and costs); Traveler's Ins. Co. v. Williams, 541 S.W.2d 587, 589-90 (Tenn. 1976) (setting forth the common fund doctrine). The common fund doctrine has its critics. See John P. Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597 (1974) (reviewing the development of the common fund doctrine and concluding that lawyers' recoveries under the doctrine are not justifiable on restitutionary grounds but instead represent attempts by judges to look out for their fellow lawyers).

[FN108]. See Lawson v. Smith, 489 N.W.2d 566, 570 (Neb. 1992) (denying a law firm that withdrew from representation any share in the ultimately created common fund).

[FN109]. See Oakley v. Fireman's Fund, 470 N.W.2d 882, 883 (Wis. 1991) (holding "that an insured is not entitled to a contribution toward his attorney's fees from his insurer if his insurer participates in the action which establishes a third party's liability to the insurer by subrogation").

[FN110]. See supra notes 47-48 and accompanying text.

[FN111]. Of course, if an insurer pays under the contract for something that is not reasonable, the insurer may not recover and may not, in the absence of an agreement, burden the settlement fund with its unrecoverable payments.

[FN112]. If L becomes counsel for S, L may be subject to discipline if he deals with S in an unlawful manner. See In re Pistotnik, 864 P.2d 1166, 1175 (Kan. 1993) (sanctioning a lawyer for inappropriate behavior during his representation of both insurer and insured). If L represents RH first, he may face not only conflicts of interest, but also problems arising out of taking compensation from a third-party payor without the consent of the client. See Cincinnati Bar Ass'n v. Schultz, 643 N.E.2d 1139, 1141 (Ohio 1994) (sanctioning a lawyer for a contingent fee arrangement that resulted in a conflict of interest and receipt of compensation from a source other than the client); In re Jones, 437 S.E.2d 10, 12 (S.C. 1993) (reprimanding attorney for a contingent fee arrangement that presented a conflict of interest between insured and subrogee).

[FN113]. See generally Robert M. Morrison et al., *Business Interruption Insurance: Its Theory and Practice* (1986).

[FN114]. Model Rules of Professional Conduct Rule 4.1 (1983).

[FN115]. See Hendry v. Pelland, 73 F.3d 397, 403 (D.C. Cir. 1996) (citing several authorities allowing fee forfeiture for improper representation of clients).

[FN116]. See In re Neville, 708 P.2d 1297, 1302 (Ariz. 1985) (extending duties "to transactions in which, although the lawyer is not formally in an attorney-client relationship with the adverse party, it may fairly be said that because of other transactions an ordinary person would look to the lawyer as a protector rather than as an adversary").

[FN117]. See supra note 20.

[FN118]. Keeton & Widiss, supra note 84, s 3.10(a)(1) (emphasis added). Keeton and Widiss regard this statement as so unexceptionable as to need no citation.

[FN119]. Jerry, supra note 17, s 96(d).

[FN120]. Id.

[FN121]. Stempel, supra note 46, s 21.5.

[FN122]. Professor Jerry regards this as the most important reason explaining why subrogation is not available to life insurers. Jerry, supra note 17, s 96(d).

[FN123]. P. 75.

[FN124]. See Stuart M. Speiser et al., *Recovery for Wrongful Death & Injury* ss 10:1-10:22 (3d ed. 1992) (discussing the classes of beneficiaries under wrongful death statutes).

[FN125]. Andrew Burrows, *The Law of Restitution* 81, 92 (1993).

[FN126]. P. 10.

[FN127]. See supra text accompanying note 11.

[FN128]. Proper appreciation of restitution is impeded by ignorance, ambiguity, and controversy. For an account of some recent controversies, see Andrew Kull, Rationalizing Restitution, 83 Cal. L. Rev. 1191, 1195 (1995) ("To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is."). Mitchell seems unaware of the debates among American legal

academics concerning the true nature of restitution.

[FN129]. For a purported critique of such statements, which may actually support the view, see Reuben Hasson, Subrogation in Insurance Law -- A Critical Evaluation, 5 Oxford J. Legal Stud. 416, 421 (1985).

[FN130]. Benchmark Bank v. Crowder, 39 Tex. Sup. Ct. J. 361, 363 (March 7, 1996).

[FN131]. 815 S.W.2d 223 (Tex. 1991).

[FN132]. Id. at 225.

[FN133]. Id. at 233.

[FN134]. Id. at 234 (Mauzy, J., dissenting).

[FN135]. The substitution was not complete in Benchmark Bank, either. The Texas Supreme Court did not require the bank to follow federal foreclosure rules. Benchmark Bank v. Crowder, 39 Tex. Sup. Ct. J. 361, 364 (March 7, 1996). If substitution were literally required, then one would expect that the subrogee would have to follow the procedures applicable to the subrogor. What else would it mean to say that S must step into the shoes of RH?

[FN136]. See generally Peter Sutcliffe, The Oxford University Press: An Informal History (1978).

[FN137]. Perhaps the best known member of this distinguished series is H.L.A. Hart, The Concept of Law (1961).

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